Supreme Court, U.S.
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No. 90-1598

IN THE

Supreme Court of the United States

October Term 1990

LAWRENCE J. KORB,

Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

Respondents.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Is a private individual's First Amendment right to be free of official retaliation for criticizing the government a "clearly established" right such that government officials are not entitled to immunity from suit for violations of such right?

LIST OF PARTIES

In addition to the parties appearing in the caption, Carl Smith was a defendant in the proceedings below in the United States District Court for the Eastern District of Virginia. On appeal before the United States Court of Appeals for the Fourth Circuit, upon joint motion of plaintiff-petitioner Lawrence Korb and Mr. Smith, the action against Mr. Smith was dismissed.

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No. 90 -

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1990

LAWRENCE J. KORB,

Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Lawrence J. Korb respectfully requests that a writ of certiorari issue to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit on November 26, 1990, as amended December 6, 1990, and January 9, 1991.

OPINIONS BELOW

The memorandum opinion and order of the United States District Court for the Eastern District of Virginia granting defendants' motion to dismiss and for summary judgment was issued on July 19, 1988. It is reproduced in the Appendix at 29a through 55a.

The opinion of the United States Court of Appeals for the Fourth Circuit affirming the decision of the district court on the grounds that the defendants were entitled to qualified immunity was issued on November 26, 1990, and is reported at 919 F.2d 243 (4th Cir. 1990). It is reproduced in the Appendix at 1a through 24a. Orders amending the Fourth Circuit opinion were entered on December 6, 1990, and January 9, 1991. They are

reproduced in the Appendix respectively at 25a through 26a, and 27a through 28a.

JURISDICTION

The opinion of the Court of Appeals was issued on November 26, 1990, and amended on December 6, 1990 and January 9, 1991. By orders entered February 15, 1991 and April 15, 1991, Chief Justice Rehnquist has extended the time for filing this petition up to and including April 15, 1991.

The Court has jurisdiction to review the judgment of the lower court pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United

States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

A. Factual Background

Petitioner Lawrence Korb served as President Reagan's Assistant Secretary of Defense (Manpower, Installations and Logistics) from 1981 to 1985. In September 1985, Korb resigned his position as Assistant Secretary of Defense and was hired by the Raytheon Company ("Raytheon"). Raytheon was and is a major defense contractor whose primary source of revenues and profits is the United States Department of Defense. Korb served as Vice President in charge of Raytheon's "Washington, D.C." office,

and was responsible for Congressional relations and liaison with various government departments, including the Department of Defense. 57a-58a.[1/]

In December 1985, Korb joined the Committee for National Security ("CNS") in his private capacity, but with the permission of Raytheon. CNS is a Washington-based, nonprofit, bipartisan organization whose members include former Defense Department officials and retired military officers. The goal of CNS is to encourage informed public debate on national security issues and to expand the constituency for policies and programs designed to advance national security while reducing the risk of

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1/ This factual recitation is based on the allegations of petitioner's amended complaint which must be accepted as true on a motion to dismiss. Kugler v. Helfant, 421 U.S. 117, 125-26 n.5 (1975).

nuclear war. For some years, CNS has published an annual alternative defense budget as one of its educational activities. 59a.

On February 25, 1986, Korb participated in a CNS press conference to announce the publication of CNS's alternative defense budget for the upcoming fiscal year. A report of the press conference appeared in the next day's Washington Post, which prominently featured Korb's role as a former Defense Department official who was now critical of proposed defense spending. The Post article stated that during the press conference Korb had urged a scaling back of the planned 600-ship, 15 carrier-group Navy that was supported by respondent John F. Lehman, then Secretary of the Navy. 58a-60a.

After reading the newspaper account of the CNS press conference, Secretary Lehman told his staff at the Pentagon that he strongly objected to Korb criticizing the Administration's proposed defense budget. That same day, with the approval of Secretary Lehman, the two officials then in charge of dispensing Navy contracts, respondent Everett Pyatt, then Assistant Secretary of the Navy (Shipbuilding and Logistics), and respondent Melvyn Paisley, then Assistant Secretary of the Navy (Research, Engineering & Systems), each telephoned high-ranking Raytheon executives. During these separate phone conversations, both Pyatt and Paisley expressed their anger at Korb's statements during the CNS press conference. 58a-61a. Pyatt and Paisley warned the Raytheon executives that Raytheon's future business dealings with

the Pentagon could be harmed by Korb's presence and demanded that Raytheon prevent Korb from criticizing the Administration's proposed defense budget. 61a. In addition, respondent Pyatt told a Raytheon executive that he would stop assisting Raytheon with certain defense contracts unless Raytheon dealt with Korb's outspokenness. Id. As a result of these explicit and implicit threats by respondents, Raytheon terminated Korb from his position. 62a.

After respondents learned that Korb had been fired in response to their telephone calls, they again contacted Raytheon. They reiterated that they wanted Korb silenced but suggested that Raytheon do so by means other than an outright dismissal. On March 19, 1986, respondent Pyatt wrote to Raytheon that "[t]he Navy objects strongly to officers

of our contractors whose salaries are paid in part by the Department of Defense, speaking as company officers, attacking President Reagan's Defense program." 62a-63a. On or about March 25, 1986, respondent Lehman telephoned the president of Raytheon and advised him to transfer Korb to another job, out of town. 63a-64a. In explaining his actions, respondent Lehman later publicly declared "I had every hope Raytheon would tell him to shut up and stop testifying against its principal customer." 64a.

On or about March 27, 1986, in response to Secretary Lehman's suggestion to Raytheon's president, Raytheon offered Korb the option of being assigned as a commercial marketing consultant to a Raytheon subsidiary in Philadelphia, Pennsylvania in lieu of dismissal from the company. This transfer would have

been a demotion for Korb and would have prevented him from speaking out on important matters of national concern. For these reasons, Korb refused to accept this alternative position, and Raytheon thereupon ended his employment. 64a-65a.

Thereafter, at the request of several members of Congress, the Office of the Inspector General of the Department of Defense conducted an investigation into respondents' conduct. The Report of Investigation, dated October 28, 1986, concluded that these "Navy officials acted improperly in that they complained to Raytheon with the intention of restricting Dr. Korb from making public statements that were contrary to Department of the Navy and the DoD positions .... The Navy officials demonstrated a lack of sensitivity to the right of persons to speak out on public

issues and to the responsibility of Government officials not to abuse their office by impinging on those rights .... The fundamental concept that Defense officials do not impinge on the right of private persons, including executives of Defense contractors, from expressing their opinions on matters of public policy, is ... self-evident." 65a-66a.

In conclusion, the Office of the Inspector General recommended, among other things, that the Secretary of Defense "remind" Defense Department officials of the "prohibition" against taking action to restrict the free speech rights of non-Defense Department personnel. The Inspector General's office further recommended that the Secretary of Defense issue disciplinary letters to respondents "concerning the impropriety of their actions and ...

their continuing belief that contractor executives lose the right to speak out on Defense policy issues if their views differ from those of the Navy." 67a.

B. Proceedings Below

On July 19, 1988, the district court dismissed all of petitioner's claims against respondents and granted respondents' motion to dismiss for failure to state a claim or in the alternative for summary judgment after denying petitioner all opportunity for discovery.[2/] 54a. The court dismissed

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[2/] Before respondents answered any of petitioner's outstanding discovery requests, the district court granted respondents' motion for a stay of all discovery "pending final determination of whether defendants enjoy qualified immunity from suit and liability in this matter." Petitioner opposed the summary judgment motion on the grounds that there were material factual disputes and that he had been wrongfully denied all opportunity for discovery.

the action on the alternative grounds that respondents' actions had not caused petitioner's harm and, if they had, respondents were nonetheless entitled to qualified immunity from petitioner's claims. The district court's ruling did not distinguish between the legal standards applicable to a motion to dismiss and to a motion for summary judgment. Petitioner appealed.

On November 26, 1990, a majority of the Fourth Circuit panel affirmed the district court, holding that respondents are entitled to qualified immunity. Judge Sprouse dissented on the grounds "that defendants are not entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800 and Anderson v.

Creighton, 483 U.S. 635." 23a-24a.[3/]

The majority granted qualified immunity on the grounds that the law was not clearly established in 1986, that "[government] officials may not seek to retaliate against a private employee through his private employer solely for his exercising his First Amendment rights," because earlier cases involving government retaliation for the exercise of First Amendment rights involved public

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3/ The court did not reach the causation issue. 14a. It affirmed the dismissal on qualified immunity grounds pursuant to Fed.R.Civ.P. 12(b)(6). 12a. The court did not address the determinations that would be required to enter summary judgment on the issue: whether there are material factual disputes and whether plaintiff was afforded the required opportunity for discovery. 12a-14a. See Anderson v. Creighton, 483 U.S. at 646 n.6 (if actions respondent claims are different than those that petitioner alleges, discovery may be necessary before a motion for summary judgment can be resolved).

employees. 20a-22a. Since Korb was a private employee, the majority held that a reasonable official could not have known that government retaliation in response to his speech would violate the First Amendment.

In its opinion as originally issued, the court stated that "We [now] deem it to be the law" that government officials may not retaliate against private employees for exercising First Amendment rights. 22a. Subsequently, however, the court amended its opinion to delete the statement "We deem it to be the law" and replaced it with the phrase "Even if it ought to be the law" (emphasis in original). 27a-28a.

REASONS FOR GRANTING THE WRIT

This case raises issues of national significance that merit plenary review by this Court. Whether private individuals have a "clearly established" right to be free of official retaliation for criticizing the government, which entitles them to a remedy against officials who violate that right, is an important question that should be settled by this Court.

The decision below granting respondents qualified immunity on the grounds that this First Amendment right is not clearly established conflicts with both this Court's free speech jurisprudence and this Court's decisions concerning qualified immunity. Anderson v. Creighton, 483 U.S. 635, 645 (1987);

Harlow v. Fitzgerald, 457 U.S. 800, 806-07, 818 (1982). The decision below also reflects an ongoing confusion in the lower courts about the proper scope of qualified immunity.

In addition, the Fourth Circuit's explicit failure to rule that petitioner's First Amendment rights were violated has the effect of immunizing future violations of the First Amendment that, in the absence of the Fourth Circuit's opinion, would have been remediable. Because of the way the qualified immunity doctrine operates, the Fourth Circuit's decision has this effect even though it wrongly decided that petitioner's First Amendment right was not clearly established. The immunity defense denies recovery for constitutional violations when public officials can point to ambiguity in the

law concerning whether their actions were illegal and the Fourth Circuit opinion now constitutes such ambiguity. If the opinion is permitted to stand, future constitutional violations of this type will be perpetually immunized.

THE FOURTH CIRCUIT'S HOLDING THAT PRIVATE INDIVIDUALS HAVE NO CLEARLY ESTABLISHED RIGHT TO BE FREE OF OFFICIAL RETALIATION FOR CRITICIZING THE GOVERNMENT ERODES ONE OF THE BASIC GUARANTEES OF OUR DEMOCRATIC SOCIETY.

Petitioner's complaint alleges that after he publicly criticized the proposed Defense Department budget respondent Navy officials pressured his employer, a Navy contractor, to make sure that he would not speak on the subject again. As a result, petitioner lost his job. Petitioner was thus directly and severely penalized by the government for the exercise of his First Amendment rights.

This Court has repeatedly made clear that such official retaliation directed at speech on a matter of public concern violates the First Amendment unless there is a compelling governmental justification for such action unrelated to the speech. First National Bank of Boston v. Bellotti, 435 U.S. 765, 786 (1978). See Rankin v. McPherson, 483 U.S. 378 (1987); Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979); Mt. Healthy City Sch. Bd. of Ed. v. Doyle, 429 U.S. 274, 283-84 (1977); Police Dept. of the City of Chicago v. Mosley, 408 U.S. 92, 95-96, 99 (1972); Pickering v. Board of Ed., 391 U.S. 563, 573-75 (1968); Mills v. Alabama, 384 U.S. 214, 218-20 (1966); New York Times v. Sullivan, 376 U.S. 254 (1964); Bates v. Little Rock, 361 U.S. 516, 524 (1960); Thornhill v. Alabama, 310 U.S. 88, 101-05

(1940). See also Reuber v. United States, 750 F.2d 1039 (D.C. Cir. 1984); Benson v. Scott, 734 F.2d 1181, 1186 (7th Cir.) cert. denied, 469 U.S. 1019 (1984); Fujiwara v. Clark, 703 F.2d 357 (9th Cir. 1983).[4/]

Accordingly, a private individual's First Amendment right to be free of official retaliation for speaking out on matters of public concern is not only fundamental, it is a clearly established right as that term is used in Harlow and Anderson v. Creighton. The Defense Department's own Inspector General described as "self-evident" the proposition that government officials may not use government influence and power to

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4/ See generally Tribe, American Constitutional Law 789-804 (1988). "Any adverse governmental action aimed at communicative impact is presumptively at odds with the first amendment." Id. at 790.

punish a person for expressing political views.[5/] No government official in 1986 could have reasonably believed anything different.

The Fourth Circuit's holding to the contrary misapplies the basic teachings of the First Amendment and is in direct conflict with this Court's decisions. If the Fourth Circuit were correct that the

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5/ The Report of Investigation by the Office of the Inspector General of the Department of Defense is excerpted in the Amended Complaint at 65a-67a.

This precept was also recognized as fundamental by members of Congress. As Senator Nunn observed in referring to Korb's situation: "I felt strongly, and I think a lot of other people do, Senator Warner said he did, that when an individual is no longer with the Government and he is basically run out of a private enterprise job by governmental officials with a threat of retaliation against the private employer, it seems to me that his rights as a citizen have been at least put in jeopardy." Nat. Security Strategy: Hearings Before the Comm. on Armed Services, S. Hrg. 100-257, Jan. 20, 1987, at 386.

First Amendment right asserted by petitioner is not clearly established despite its core nature and the precedents from this Court, then the doctrine of qualified immunity would in effect eviscerate the right to a meaningful remedy for all First Amendment violations except when precisely the same factual circumstances have previously been adjudicated. Petitioner respectfully submits, therefore, that the Court should grant certiorari in order to preserve what all agree is a central protection of the First Amendment: namely, the right to criticize the government and its officials without fear of retaliation. See New York Times v. Sullivan, 376 U.S. 254, 269-71 (1964).

In failing to recognize that petitioner's First Amendment claim rested on clearly established law, the Fourth

Circuit's holding also misconstrues and misapplies this Court's decisions concerning the defense of qualified immunity. Those decisions clearly reject the claim that a qualified immunity defense is appropriate in constitutional cases unless "the very action in question has previously been held unlawful." Anderson v. Creighton, 483 U.S. at 640. The unlawfulness must merely be apparent in the light of pre-existing law. Id. And the determination of the existence of "clearly established law" depends "upon the level of generality at which the relevant 'legal rule' is to be identified." Id. at 639.

Here the Fourth Circuit erred in holding that the law was not clearly established because it articulated the relevant legal right too narrowly. While recognizing that "the Supreme Court has

held that government officials may not retaliate against public employees for speaking on matters of public concern," 20a, the Fourth Circuit held that the law was not clearly established that government "officials may not seek to retaliate against a private employee through his private employer solely for his exercising his First Amendment rights". 22a. By insisting that in the context of petitioner's claim, there be previous case law specifically prohibiting retaliation through a private employer, the Fourth Circuit demanded a closer factual nexus with pre-existing free speech cases than this Court's

decisions have ever required.[6/] See 483 U.S. at 640. See also Andrews v. Philadelphia, 895 F.2d 1469, 1479-80 (3rd

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[6/] The Fourth Circuit never explains why the First Amendment protection for public employees does not also apply a fortiori to private employees. The fact that the petitioner is a private individual and not a public employee makes his First Amendment claim stronger, not weaker, because there is no countervailing governmental interest as employer in promoting the efficiency of the service it performs. See Benson v. Allphin, 786 F.2d 268, 278-79 (7th Cir.), cert. denied, 479 U.S. 848 (1986).

In addition, the district court decision in Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983) does not support the Fourth Circuit's conclusion that these First Amendment rights of private employees were not clearly established in 1986. See 18a-19a. That case held only that government officials may transmit information concerning a private individual to that individual's employer without infringing any right of privacy. The Fourth Circuit does not address the applicable precedent recognizing private individuals' First Amendment rights to be free from government retaliation. See, e.g., Benson v. Allphin, 786 F.2d at 278; Reuber v. United States, 750 F.2d 1039, 1063 (D.C. Cir. 1984) (Bork, J., concurring).

Cir. 1990) (even though no case directly on point, the general right was established); Alexander v. Perrill, 916 F.2d 1392, 1397-8 (9th Cir. 1990) (to defeat qualified immunity no prior case with the exact factual situation required).

The Fourth Circuit's misunderstanding of the specificity required for First Amendment rights to be clearly established in the context of a private individual's right to be free of official retaliation is shared by other courts. See e.g., Rakovich v. Wade, 850 F.2d 1180, 1211-14, 1216-17 (7th Cir.) cert.

denied, 488 U.S. 968 (1988).[7] It also reflects a more general confusion in the lower courts concerning the meaning of "clearly established".[8] This Court

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[7] Compare Dube v. State University of New York, 900 F.2d 587 (2nd Cir. 1990); Thompson v. City of Starkville, 901 F.2d 456 (5th Cir. 1990); Burgess v. Pierce County, 918 F.2d 104 (9th Cir. 1990); Stewart v. Baldwin County, 908 F.2d 1499 (11th Cir. 1990); Roth v. Veteran's Admin., 856 F.2d 1401 (9th Cir. 1988); (all denying qualified immunity in the absence of case law directly on point) and Melton v. City of Oklahoma, 879 F.2d 706 (10th Cir. 1989).

[8] Cleveland-Perdue v. Burtsche, 881 F.2d 427 (7th Cir. 1989) cert. denied, 111 S.Ct. 368 (1990)(what is clearly established has not been addressed by the Supreme Court); Robinson v. Bibb, 840 F.2d 349, 351 (6th Cir. 1988) (same).

should clarify this important issue in this First Amendment context.[9/]

Finally, unless this Court issues a writ, the existence of the Fourth Circuit opinion will immunize future constitutional violations that would otherwise be remediable. The opinion reflects what has become a prevalent practice in the lower courts: ruling on the qualified immunity issue without ruling on the existence of the right at issue. In its opinion as originally issued, the Fourth Circuit held that a

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[9/] Anderson's analysis concerning when Fourth Amendment rights are clearly established is not dispositive concerning when this First Amendment right is clearly established because the Fourth Amendment right by its nature includes an inquiry into reasonableness that is not present in the First Amendment. "We have frequently observed, and our many cases on the point amply demonstrate, the difficulty of determining whether particular searches or seizures comport with the Fourth Amendment." Anderson, 483 U.S. 644.

private employee does have a First Amendment right in this context. 22a. However, the court then amended its opinion to delete this holding. 27a-28a. Even though the Fourth Circuit is incorrect that the right is not clearly established, the effect of its amended opinion will be that in the future, officials who could not claim before the opinion was issued that they reasonably could not have known that the First Amendment prohibits retaliation against private individuals will now be entitled to immunity from suit for such actions. Even if the Fourth Circuit were correct about the law's uncertainty, without any ruling on the substantive right the alleged uncertainty of the law is never resolved and the only precedent established is the perpetual viability of

the qualified immunity defense.[10/] Thus, the effect of the Fourth Circuit's opinion is to deny a remedy not only to petitioner but also to those who come after him; it immunizes future constitutional violations that were prohibited in the past.

CONCLUSION

This case presents important and unsettled issues concerning the protection of the First Amendment and the applicability of the qualified immunity defense. The result reached by the

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10/ Although the contours of constitutional rights could theoretically be spelled out in actions for equitable relief, in practice this is unlikely to happen because of the many barriers to such relief. "[A]ction[s] for damages may offer the only realistic avenue for vindication of constitutional guarantees." Anderson v. Creighton, 483 U.S. at 638 quoting Harlow v. Fitzgerald, 457 U.S. at 814.

Fourth Circuit, if left standing, will seriously undermine the constitutional interest in free and unhindered debate on matters going to the core of self-government. For all of these reasons, the petition for certiorari should be granted.

Respectfully submitted,

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Dated: April 15, 1991

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Lawrence J. Korb,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 88-1746
	)	
John F.Lehman, Jr., et al.,	)	
	)	
Defendants-Appellees.	)	

STAKER, District Judge:

The appellant, Dr. Lawrence J. Korb, appeals from the dismissal of his Bivens claim[1/] against the appellees, John F. Lehman, Melvyn Paisley, and Everett Pyatt, which sought compensatory and punitive damages for the alleged violation of his First Amendment rights. For the reasons set forth below, we affirm.

1/ Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971).

I.

Dr. Korb served as President Reagan's Assistant Secretary of Defense (Manpower, Installations and Logistics) from 1981 to 1985. After he resigned his Defense Department position in September of 1985, Korb was hired by Raytheon Corporation as Vice President in charge of the Washington, D.C., office. In that position, Korb was responsible for Raytheon's relations with Congress and various government departments, including the Department of Defense.

Despite his reputation as a champion of President Reagan's arms build-up policy, Korb joined the Committee for National Security (CNS), a group of private citizens organized to encourage informed debate about national security issues. The group, which includes former

Defense Department officials and military officers, publishes an annual alternative defense budget that is largely critical of the amount of monies spent on national defense. Korb's CNS membership was approved by Raytheon.

In February of 1986, Korb spoke at a news conference to announce the publication of CNS' alternative defense budget. At that conference, the events of which were chronicled in local newscasts and a Washington Post news article, Korb called for a reordering of priorities and suggested a $200 billion reduction in defense spending over a period of five years to be accomplished, in part, by scaling back a planned 600-ship, 15-carrier Navy fleet. This planned Navy build-up was strongly supported by the Secretary of the Navy, John Lehman. The Washington Post article, entitled

Washington Post article, entitled "Pentagon Ex-Defender Turns Critic"[2/] identified Korb as "a private citizen working for arms-maker Raytheon Co."

Reports of the press conference soon reached both the Department of Defense and Raytheon. Upon reading the Washington Post article, Secretary Lehman met with members of his staff and expressed his indignation about Korb's remarks and his belief that a company under contract to the Navy might be advancing programs that would seriously impair national defense. However, Lehman made no representation that he would seek retribution against either Korb or Raytheon, and at no time during the meeting did he encourage his subordinates to pursue the matter with Korb's superiors. Meanwhile, at Raytheon,

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2/ Washington Post, Pg. A17, Col. 2, Wednesday, Feb. 26, 1986.

activities. Several executives felt that the statements attributed to Korb were not appropriate for a Raytheon employee and that the company would be inexorably associated with the well-publicized views of Korb.

Shortly after the conclusion of Secretary Lehman's meeting, two staff members who were in attendance, Melvyn R. Paisley, Assistant Secretary of the Navy (Research, Engineering and Systems), and Everett Pyatt, Assistant Secretary of the Navy (Shipbuilding and Logistics), called Raytheon executives to voice their displeasure with Korb's statements. Paisley, believing Korb's position to be contrary to that taken by Raytheon in earlier meetings with Navy officials, called R. Gene Shelley, a senior vice president of Raytheon and well-known business associate. During that call,

Paisley was frank in his criticism of Korb, averring that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting. At no time during the conversation did Paisley suggest that Raytheon take any punitive action against Korb. In fact, in a follow-up letter dated March 19, 1986, Paisely communicated to Shelley his belief that the entire matter had been resolved to his satisfaction.

Also on February 26, 1986, Pyatt called Dennis Picard, senior vice president and general manager of Raytheon's missile division. During that conversation, Pyatt expressed his dismay about the positions attributed to Korb -- in particular, the claim that $200 billion could be cut from defense spending over the next five years and the

contention that the Navy's commitment to build and staff 600 ships could be abandoned, without affecting the security of the United States. Pyatt also informed Picard that the Navy is not permitted to absorb a contractor's lobbying expenses as reimbursable costs, and that, through the payment of general overhead accounts, the Navy was, in effect, contributing to a portion of Korb's Raytheon salary. Pyatt did not demand, request, or suggest that Raytheon take any personnel action regarding Korb. Nor does the record before us reflect that Pyatt attempted to intimidate, coerce, or threaten Picard or Raytheon in any way.

During subsequent interviews conducted during an investigation into this matter, both Picard and Shelly indicated that they did not consider the telephone calls

to be inappropriate in any way. And, although Secretary Lehman did not ask Paisley or Pyatt to contact Raytheon directly, he did express approval upon learning that the calls had been made.

Picard and Shelly both contacted Korb's principal supervisor, Philip Phalon, to express their own dissatisfaction with Korb's news conference and to report on the Navy's reaction. Phalon was the individual principally responsible for the hiring of Korb. In the months preceding the news conference, both he and several other high-ranking Raytheon officials had become increasingly dissatisfied with the way in which Korb performed his job. Specifically, Phalon took exception to Korb's regular absence from the office, the result of speaking engagements around the country. Further, Phalon was angered

by a network evening news program on which Korb appeared making comments that were critical of the then unannounced federal defense budget. That particular interview was taped in Raytheon's Washington, D.C., office.

Concluding that Korb was not the right man for the job, Phalon made an initial determination to terminate him. Admittedly, the calls from the Navy were a factor considered by Phalon in making such a decision. However, those calls were not determinative. Phalon described the events leading to Korb's demise as follows: "Dr. Korb's departure from [Raytheon was] part of a continuum. It was not triggered by Navy calls. Nor [were such calls] a decisive moment in time for Dr. [Korb] and his relationship with Raytheon Company." This sentiment was echoed by J. Brainard Holmes, then

president of Raytheon, who testified he too was generally dissatisfied with the manner in which Korb performed his job.

Although Secretary Lehman was frank in his comments about Korb's actions, stating that he "had every hope Raytheon would tell [Korb] to shut up and stop testifying against its principal customer," upon hearing of Korb's impending termination, Lehman called Holmes to reiterate that the Navy could continue to work with Korb and to urge Holmes to reconsider the decision to dismiss Korb. Holmes assured Lehman that Raytheon would take the Secretary's views into consideration, but that a decision based upon Korb's entire employment record would be made.

Ultimately, against the articulated wishes of Lehman, Paisley and Pyatt, Raytheon decided to offer Korb another

position in Philadelphia, which he declined to accept. Shortly thereafter, at the request of Congress, the Department of Defense conducted an investigation into the affair headed by Special Inquiries Investigator Lieutenant Colonel R.P. Jones, USAF. At the conclusion of the investigation, Jones reported that there was no evidence to suggest that Navy officials either requested or intended that Korb be fired. Further, according to the report, Korb's departure from Raytheon was not solely attributable to the complaints by Paisley and Pyatt, but rather to a combination of factors that included the complaints of the Navy officials, as well as complaints from a staff member of the Senate Armed Services Committee, Carl M. Smith, and other Raytheon executives.

II.

In dismissing this action prior to trial, Fed.R.Civ.P. 12(b)(6), the district court relied on alternative grounds. The court held that "when the defendants' alleged conduct is judged 'in light of pre-existing law,' what is 'apparent' is that the conduct was entirely appropriate and lawful." Anderson v. Creighton, 483 U.S. 635 (1987). It decided, therefore, that "plaintiff's allegations fail to state a claim of violation of clearly-established law and defendants are . . . protected by qualified immunity." Mitchell v. Forsyth, 472 U.S. 511 (1987). Alternatively, the court held that "[a] plaintiff seeking damages for a constitutional tort must prove causation in fact, Beard v. O'Neal, 728 F.2d 894,

898 (7th Cir. 1984), cert. denied, 469 U.S. 825 (1984), and government officials may not be held liable where the harm suffered by the plaintiff was 'too remote a consequence' of the official conduct. Martinez v. California, 444 U.S. 277, 285 (1980)."

Because this was a decision based solely on the pleadings and supporting materials, our review of the record before us is de novo, and we are constrained by the standard employed by the district court. Fed.R.Civ.P. 56(c); Pachaly v. City of Lynchburg, 897 F.2d 723 (4th Cir. 1990). We may, however, affirm on any ground fairly supported by the record. Lee v. United States, 809 F.2d 1406, 1408 (9th Cir. 1987). After reviewing the record before us, we believe that the district court correctly dismissed Korb's cause of action and,

without reaching the issue of causation in fact, affirm on the basis that the appellees were protected by qualified immunity.

III.

In almost any action against a government official involving an alleged deprivation of constitutional rights a court is presented with a threshold question of the defendant's immunity. "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have know [sic]." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)(citations omitted). This type of immunity is generally referred to as qualified immunity. Id. at 807. Except

for certain specified exceptions, this is the form of immunity applicable to federal executive officials. Id. Qualified immunity not only shields a government official from liability for damages but it will also shield him or her from having to stand trial. Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985). Consequently, the question of immunity is independent of the merits of a plaintiff's claim, id. at 527-28, and may be decided in the early stages of litigation, even prior to discovery. See Harlow, 457 U.S. at 818; accord, Turner v. Dammon, 848 F.2d 440, 443 (4th Cir. 1988). This is what the district court did in this case, finding that the appellees were immune from suit because their conduct did not violate clearly established law. District Court's

Memorandum Opinion, Joint Appendix at 205, 212-17.

The central question in determining the issue of qualified immunity is whether or not the conduct of the government official violated "clearly established law," i.e., the "'objective legal reasonableness' of [his] action . . . assessed in light of the legal rules that were 'clearly established' at the time it was taken. . . ." Anderson v. Creighton, 483 U.S. 635, 639, (1987)(citations omitted). "This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful . . . but it is to say that in the light of pre-existing law the unlawfulness must be apparent." Id. at 640 (citations omitted). "[U]nder [this] test, an

official may be entitled to immunity from suit even where he has violated a plaintiff's rights -- if [those rights] were not then 'clearly established' or if a 'reasonable person' in the official's position could have failed to appreciate that his conduct would violate them." Collinson v. Gott, 895 F.2d 994, 998 (4th Cir. 1990) (per curiam)(Judge Phillips concurring)(citation omitted). A court, in making the determination as to whether a constitutional right has been violated, should not look at the right at its most general level but at "its application to the particular conduct being challenged." Id. (citation omitted); Anderson, 483 U.S. at 639-40. If there exists a "legitimate question" as to whether particular conduct violates a particular right then the right is not clearly established and qualified immunity

applies. See Tarantino v. Baker, 825 F.2d 772, 775 (4th Cir. 1987).

The conduct being challenged herein is the appellees' contact with officials of Korb's employer in order to express their displeasure with and criticism of Korb for his public critical comments regarding the proposed Department of Defense budget and allegedly to cause his employer to fire him for making such comments. Korb contends that this conduct violated his First Amendment right of free speech. The district court found that the appellees were entitled to qualified immunity because no statute or agency rule or regulation prohibited the conduct alleged. Furthermore, case law, Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983), had held that high-level government officials had the right to

communicate to entities doing business with their department adverse comments concerning the entitites' representatives. Id. at 756. Thus, the unlawfulness of the appellees' conduct was not clearly established. Joint Appendix at 216-17.

The protection of citizens' right to speak publicly on matters of public concern, such as the nation's defense budget, is at the very heart of the First Amendment. First National Bank v. Bellotti, 435 U.S. 765, 776 (1978). On such matters "free and open debate is vital to informed decision making. . . ." Pickering v. Board of Education, 391 U.S. 563, 571-72 (1968). The Supreme Court has said that it is essential to protect the rights of persons having special knowledge or expertise to speak on an issue of public concern. Id. at 572.

"'[S]tatements criticizing public policy and the implementation of it must be similarly protected.'" Rankin v. McPherson, 483 U.S. 378, 387 (1987)(citations omitted). It is for this reason that the Supreme Court has held that government officials may not retaliate against public employees for speaking on matters of public concern. E.g., id.; Pickering, supra. We see no reason why the same protection should not extend to employees of private entities.

"[T]he right to hold specific private employment and to follow a chosen profession free from unreasonable governmental interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment. . . . " Greene v. McElroy, 360 U.S. 474, 492 (1959). The actions of government officials which cause a private employee to be deprived

of his employment give rise to a Bivens-type action against those officials for violation of due process. Merritt v. Mackey, 827 F.2d 1368, 1371 (9th Cir. 1987). We believe a Bivens action should also exist when government officials cause a private employee to be fired by his private employer for exercising his First Amendment right to speak out on matters of public concern. Cf. Reuber v. United States, 750 F.2d 1039, 1054-59 (D.C. Cir. 1985)(private employee has Bivens-type cause of action against his employer -- a government contractor -- for violation of First Amendment rights when disciplinary action taken against plaintiff at behest of and in conjunction with government officials). Government officials may "offer adverse commentary upon the integrity, competence, judgment, or discretion," Donohoe, 546 F. Supp. at

756, of a private employee. We deem it to be the law that such officials may not seek to retaliate against a private employee through his private employer solely for his exercising his First Amendment rights; however, such was not clearly established to have been the law when appellees committed the acts of which Korb complained.

Of course, a plaintiff would have to show that his employer's actions were the result of the exercise of coercive power or direct or indirect significant encouragement by the government officials. See Blum v. Yaretsky, 457 U.S. 991, 1004 (1982); Reuber, 750 F.2d at 1057-58 & 1063 (Judge Bork concurring). Furthermore, a court should consider those factors applicable to cases involving public employees, Piver v. Pender County Bd. of Educ., 835 F.2d

1076, 1081 (4th Cir. 1987), cert. denied, 487 U.S. 1206 (1988), in determining whether the speech in question involved matters of public concern.

Given what we have just said, what is clear is that at the time the conduct alleged in the complaint occurred, there was no law declaring that such conduct might give rise to a constitutional violation. In fact, the contrary was indicated. Donohoe, supra. The district court, therefore, was correct in finding that the appellees did not violate "clearly established" law and were thus protected from suit by qualified immunity. The judgment of the district court in dismissing this action is

AFFIRMED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent, feeling that the defendants are not entitled to qualified immunity under Harlow v. Fitzgerald, 457 U.S. 800, and Anderson v. Creighton, 483 U.S. 635.

Filed: December 6, 1990

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-1746
(CA-88-207-A)

Lawrence J. Korb,

Plaintiff - Appellant,

versus

John F. Lehman, Jr., Et al,

Defendants - Appellees.

O R D E R

The Court amends its opinion filed

November 26, 1990, as follows:

On page 9, second full paragraph, line 7 -- the word "know" is corrected to read "known."

For the Court - By Direction

/s/ John M. Greacen

CLERK

Filed: January 9, 1991

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 88-1746
(CA-88-207-A)

Lawrence J. Korb,

Plaintiff - Appellant,

versus

John F. Lehman, Jr., et al,

Defendants - Appellees.

O R D E R

The Court further amends its opinion filed November 26, 1990, as amended by order filed December 6, 1990, as follows:

On page 13, first paragraph, line 7 -- The sentence beginning "We deem it to be

the law" is amended to begin "Even if it ought to be the law."

On page 13, first full paragraph -- the whole paragraph beginning "Of course, a plaintiff" is deleted.

For the Court - By Direction

/s/ John M. Greacen

CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

LAWRENCE J. KORB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL
	)	ACTION NO.
JOHN F. LEHMAN, et al.,	)	88-0207-A
	)	
Defendants.	)	

MEMORANDUM OPINION

This matter came before the Court upon defendants John F. Lehman, Jr., Melvyn R. Paisley, Everett Pyatt, and Carl M. Smith's motion to dismiss, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, or in the alternative, for summary judgment, pursuant to Rule 56(c) of the Federal Rules of Civil Procedure.

Plaintiff Lawrence J. Korb seeks compensatory and punitive damages against

defendants Lehman, Paisley, Pyatt, and Smith. Lehman, Paisley, and Pyatt are present or former high-ranking Navy officials who are alleged to have caused Dr. Korb's termination in 1986 from his position as vice-president of Raytheon Company. Defendant Smith, a staff member of the Senate Armed Services Committee, is also alleged to have caused Korb's termination. Raytheon is a major contractor with various agencies of the United States Department of Defense, including the United States Navy. At the time of the events that gave rise to this dispute, defendant Lehman was Secretary of the Navy, and defendants Paisley and Pyatt were Assistant Secretaries of the Navy. Defendant Smith was a staff member of the Senate Armed Services Committee. All of the defendants are alleged to have made telephone calls to Dr. Korb's

superiors complaining about plaintiff's statements at a news conference concerning defense policy.

After four years as the Assistant Secretary of Defense (Manpower, Installations and Logistics), plaintiff went to work for Raytheon in September 1985. As vice president in charge of Raytheon's Washington, D.C. area office, plaintiff was responsible for Raytheon's relations with Congress and the Department of Defense.

On February 25, 1986, Dr. Korb, as a member of an organization called the Committee for National Security ("CNS"), participated in a news conference to announce the publication of CNS' "alternative defense budget." An article appeared in the next morning's Washington Post, describing CNS as advocating a $200 billion reduction in the President's

defense budget, and quoting Dr. Korb as criticizing the administration's plan to build a 600-ship Navy. The article, headlined "Pentagon Ex-Defender Turns Critic," identified Dr. Korb as "a private citizen working for arms maker Raytheon Co.," speaking "as a member of the Committee on National Security."

Upon learning of Dr. Korb's remarks from news accounts, and prior to any comments from the Navy or others outside Raytheon, several Raytheon executives became upset. They felt that Dr. Korb's statements were not appropriate for a Raytheon executive and that, by virtue of Dr. Korb's status as an officer of the company, Raytheon would inevitably be associated with Dr. Korb's views.

Defendants also became aware of Dr. Korb's remarks through the next day's press accounts of the news conference.

Secretary Lehman raised the issue at his morning staff meeting, expressing indignation that one of the Navy's contractors would be advancing programs that he believed would seriously impair national defense. His comments were addressed to the meeting generally, and not to anyone in particular.

Assistant Secretaries Paisley and Pyatt attended that meeting. When Mr. Paisley learned of Dr. Korb's remarks, he felt they were "inappropriate." He had attended meetings with Raytheon officials who had supported the President's defense spending policies, Paisley now doubted their credibility and felt he had been deceived. Shortly after the meeting, Mr. Paisley on his own initiative called a senior vice president of Raytheon, R. Gene Shelley, with whom Mr. Paisley had frequently worked in the past. Mr.

Paisley knew of no statute or regulation that barred him from calling defense contractors concerning positions being taken by their personnel, and it was not unusual for Mr. Paisley to call Mr. Shelley.

Assistant Secretary Paisley told Mr. Shelley that he was troubled by the statements attributed to Korb in the Washington Post article, and expressed his view that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting. Mr. Paisley did not ask Mr. Shelley to silence Dr. Korb or to take any action against plaintiff. Mr. Shelley did not view the call as an invitation to take any action against Dr. Korb or have the sense that Mr. Paisley implicitly expected some action to be taken. Mr. Shelley considered the phone

call "a minor flap," not relevant to whether Raytheon won or lost defense contracts.

On the same day, Assistant Secretary Pyatt, acting on his own initiative, called Dennis Picard, who is Raytheon's senior vice president and general manager of the Missile Systems Division. Mr. Pyatt told Mr. Picard that he disagreed with and was unhappy about the positions attributed to Korb; particularly, the claim that $200 billion could be cut from planned defense spending during the next five years, and the contention that the Navy's commitment to build and man 600 ships could be abandoned, without adversely affecting the security of the United States.

Mr. Pyatt did not demand, request or suggest that Raytheon take any personnel action regarding Dr. Korb. Nor did Mr.

Pyatt attempt to intimidate, coerce, or threaten Mr. Picard or Raytheon in any way. Mr. Picard did not consider Pyatt's call to be inappropriate in any respect.

Secretary Lehman did not ask Mr. Paisley or Mr. Pyatt to make these contacts. When he learned of the phone calls after-the-fact, Secretary Lehman expressed approval that the calls had been made.

Mr. Picard and Mr. Shelley called Dr. Korb's principal supervisor, Philip Phalon, to express their own dissatisfaction with Dr. Korb's news conference and to report the Navy's reaction to Dr. Korb's public statements. Mr. Phalon's Raytheon colleagues did not tell him that the Navy callers had asked Raytheon to silence or terminate Dr. Korb, or that the Navy had somehow threatened, coerced, or intimidated them.

Mr. Phalon did not receive any calls directly from Navy officials immediately following news coverage of Dr. Korb's press conference.

Mr. Phalon was the individual principally responsible for hiring Dr. Korb. During the six months between the date that plaintiff was hired and the news conference, Mr. Phalon and other Raytheon executives had become displeased with Dr. Korb's job performance. In fact, Mr. Picard had concluded that Dr. Korb was not the "right man for the job." Mr. Phalon was concerned that plaintiff was frequently absent from the Washington office because of his extensive speaking schedule, and felt that plaintiff's frequent appearances in the press were inconsistent with his duties at Raytheon. Mr. Phalon also became upset when he viewed Dr. Korb on a network evening news

program, in an interview that was taped in Raytheon's Washington office, making comments that were critical of the yet-to-be announced federal defense budget. He decided then to consider changing Dr. Korb's assignment.

Sometime between February 26 and mid-March 1986, Mr. Phalon, after consulting with others at Raytheon, made an initial decision to terminate Dr. Korb. While the calls to Raytheon complaining of Dr. Korb's press statements were considered by Mr. Phalon, they did not cause his decision to remove Dr. Korb as head of the Washington office. Rather, "Dr. Korb's departure from [Raytheon] was part of a continuum," according to Mr. Phalon, and the calls from the Navy "were not even a decisive moment in time" for Dr. Korb's relationship with Raytheon.

In mid-March, Secretary Lehman called D. Brainerd Holmes, who was then president of Raytheon. Secretary Lehman had heard reports that Dr. Korb was going to be terminated, and called to urge that this not be done. Secretary Lehman assured Mr. Holmes that the Navy could work with Dr. Korb and asked Mr. Holmes if Raytheon would reconsider its decision to terminate him. Secretary Lehman did not suggest or ask that Raytheon take any action against Dr. Korb, nor did he make any express or implied threats or statements that could be considered intimidating or coercive. Mr. Holmes said the company would take Secretary Lehman's views into consideration, but would make a decision about Dr. Korb independent of his relations with the Navy.

On March 7, Assistant Secretary Pyatt met with Mr. Phalon. Mr. Phalon was assessing whether Dr. Korb should be removed from his position as Washington Vice President for Raytheon, and sought Mr. Pyatt's views. Mr. Pyatt responded that the matter was solely for Raytheon to decide. Mr. Pyatt stressed that the Navy was fully prepared to work with Dr. Korb in the future, if Raytheon should decide against making a change. Assistant Secretary Pyatt reiterated these views in a letter to Mr. Phalon dated March 19. Assistant Secretary Paisley also wrote a letter at this time to his contact at Raytheon, urging that Dr. Korb be retained in some capacity by the company.

Eventually, the company decided to offer Dr. Korb another position, which he declined to accept. Nonetheless, Dr. Korb

was kept on Raytheon's payroll until at least September 1986, long after he had ceased performing any services for the company.

The Supreme Court has held that government officials will not be held liable for the actions of private parties where the officials did not cause the conduct of which plaintiff complains. Constitutional standards are invoked only when the state is responsible for the specific conduct. Blum v. Yaretsky, 457 U.S. 991 (1982); Carter v. Norfolk Community Hospital Ass'n, 761 F.2d 970 (4th Cir. 1985). Government officials should be held accountable for private conduct only when they exercise something approaching coercive power over the decision making processes of the private entity. Blum, 457 U.S. at 1004.

Even taking all of plaintiff's allegations as true, the Amended Complaint does not allege that the defendants exercised coercive power. Plaintiff does not and cannot allege that defendants controlled Raytheon's personnel decisions or compelled Dr. Korb's reassignment or termination. Even if the "stimulus" to fire and employee "originates with the government, a private individual's independent conduct based on information supplied to him by a government official cannot be characterized as state-action." Donohoe v. Watt, 546 F. Supp. 753, 757 (D.D.C. 1982), aff'd, 713 F.2d 864 (D.C. Cir. 1983). Thus, the essential element of government action is missing from plaintiff's allegations. Where there is no state action, there can be no

constitutional cause of action for damages upon which relief can be granted.

As high-ranking federal officers performing discretionary duties, the Navy defendants enjoy qualified immunity from suit and liability for constitutional torts. Harlow v. Fitzgerald, 457 U.S. 800, 813-14 (1982); Donohoe, 546 F. Supp. 753. The qualified immunity doctrine "is intended to allow public officials to act 'with independence and without fear of consequences' where their actions do not implicate clearly established law." Turner v. Dammon, No. 86-3628, slip op. at 5-6 (4th Cir. May 3, 1988, as amended May 17, 1988, as amended May 31, 1988) (quoting Harlow, 457 U.S. at 819).

Plaintiff alleges, in essence, that defendants made statements in response to his public comments about defendants' policies that provoked a private

corporation to fire him. Plaintiff does not allege that Secretary Lehman directed Assistant Secretaries Paisley and Pyatt to call Raytheon officials, or that he told them what to say in those phone calls. Plaintiff alleges, based on information and belief, that Mr. Pyatt said he would "stop assisting Raytheon with certain defense contracts" but does not allege that Pyatt conditioned any such "assistance" on Raytheon's taking personnel action against Dr. Korb. Indeed, there is no allegation whatever that any of the defendants asked Raytheon to terminate Dr. Korb. As to Raytheon's decision to terminate Dr. Korb, the complaint alleges only that the decision was a "direct and immediate reaction" to calls from Navy officials. It does not allege that defendants caused or compelled Raytheon to reassign Dr. Korb,

or that the decision was other than that of an independent, private actor.

Dr. Korb's complaint fails to state a claim against the Navy defendants from which they would not be immune. Applying the Harlow analysis, the Court must first determine whether defendants were carrying out a discretionary function within the scope of their official duties when they contacted Raytheon. Harlow, 457 U.S. at 816. The Amended Complaint alone establishes that the Navy defendants were carrying out official, discretionary functions when they expressed their disagreement with Dr. Korb's public statements regarding defense and Navy policy. The complaint asserts that defendants were serving as Secretary and Assistant Secretaries of the Navy, that the telephone calls from the three defendants to Raytheon were

made from defendants' offices, that defendant Pyatt wrote a letter to Raytheon on official Navy stationary mailed from the Pentagon, and that the Navy defendants acted "under color of their authority as Navy officials...."

More to the point, the Supreme Court has defined the performance of discretionary duties as the exercise of "independent judgment," Westfall v. Erwin, ___ U.S. ___, 108 S.Ct. 580, 584 (1988), turning on "the decisionmakers' experiences, values, and emotions." Harlow, 457 U.S. at 816. Based on this definition, defendants clearly were acting within bounds of their discretionary duties when they communicated with a company having business with the government about matters bearing on the "integrity, competence, judgment, or discretion" of

one of the company's representatives. Donohoe, 546 F. Supp. at 756.

The statutory duties of the Secretary of the Navy, which he in turn may delegate to Assistant Secretaries pursuant to 10 U.S.C.A. § 5016 (West. Supp. 1988), include the functions of supplying and equipping the Department, and the construction, outfitting, and repair of military equipment. 10 U.S.C.A. § 5013 (West Supp. 1988). Thus, as high-ranking Navy officials, their official duties included keeping in contact with major Navy defense contractors concerning all matters affecting the relationship between contracting parties. Dr. Korb's statements were not about public issues that were wholly irrelevant to these official duties, but rather, directly implicated the Navy budget and

procurement program, matters at the core of the Secretary's and Assistant Secretaries' functions. Furthermore, defendants believed Dr. Korb's assertions were erroneous and harmful to the national defense. As part of their responsibilities, they were required to exercise discretion to determine whether and how to react to such public statements. In sum, the defendants' conduct fell within the ambit of their discretionary official functions.

The court must next consider whether defendants reasonably could have believed that their alleged conduct was consistent with Dr. Korb's first amendment rights. Anderson v. Creighton, ___ U.S. ___, 107 S.Ct. 3034 (1987). In making this assessment, the court is not to rely on plaintiff's generalized assertion that the right to speak freely on defense

policy is self-evident. Rather, the inquiry focuses on whether the impropriety of defendants' conduct was apparent "in light of preexisting law." Anderson, 107 S.Ct. at 3039. Defendants cannot be charged with a violation of clearly established law where the legal precedents are "unsettled and fact-specific [in] nature." Tarantino v. Baker, 825 F.2d 772, 779 (4th Cir. 1987). Instead, "the contours of [plaintiff's] right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson, 107 S.Ct. at 3039. Judged in this light, plaintiff fails to allege a violation of clearly established law.

Plaintiff cites no statute or regulation in effect at the time that made it improper for Secretary Lehman to criticize Dr. Korb at a staff meeting, or

for the other defendants to express their opinions to a defense contractor about the views or conduct of one of the contractor's employees. Similarly, no policy or other internal directive of the Navy or DOD barred or circumscribed defendants' discretion in this regard. In fact, the 1982 Donohoe case had held that conduct like that engaged in by defendants did not violate clearly established rights. Donohoe, 546 F. Supp. 753.

Thus, when defendants' alleged conduct is judged "in light of pre-existing law," what is "apparent" is that the conduct was entirely appropriate and lawful. Anderson, 107 S.Ct. 3034. The plaintiff's allegations fail to state a claim of violation of clearly established law, and defendants are therefore

protected by qualified immunity. Mitchell v. Forsyth, 472 U.S. 511 (1987).

The record further demonstrates that their conduct was not the proximate cause of Dr. Korb's injury. Assistant Secretaries Paisley and Pyatt did not expressly or implicitly ask that Dr. Korb be silenced or terminated when they telephoned their contracts [sic] at Raytheon. They did not make statements that were expressly or implicitly threatening, and the Raytheon officials did not perceive their calls to be coercive or intimidating. Furthermore, Secretary Lehman neither directed his assistant secretaries to make those calls, nor told them what to say.

The Raytheon official responsible for Dr. Korb's termination, Philip Phalon, did not communicate with anyone from the Navy immediately following Dr. Korb's

news conference. He stated that Raytheon's decision was based on building dissatisfaction with Dr. Korb's job performance and on Raytheon's independent judgment that his continuing employment as head of the Washington office was not in the company's best interests. At most, the record shows that the Navy's negative reaction to Dr. Korb's news conference was just one of the factors taken into account, but not the determinative factor in his decision.

A plaintiff seeking damages for a constitutional tort must prove causation in fact, Beard v. O'Neal, 728 F.2d 894, 898 (7th Cir. 1984), cert. denied, 469 U.S. 825 (1984), and government officials may not be held liable where the harm suffered by plaintiff was "too remote a consequence" of the official conduct.

Martinez v. California, 444 U.S. 277, 285 (1980).

In sum, there is no evidence that defendants threatened or coerced Raytheon to induce the company to silence or remove Dr. Korb, and no causal link between defendants' conduct and plaintiff's termination.

The allegations against defendant Smith are essentially that he, too, made phone calls to Raytheon which caused plaintiff's termination. As with the complaint against the three Navy defendants, there is no causal connection between his actions and those of Raytheon, and he is also entitled to immunity.

Plaintiff has also asserted a claim against defendant Smith alleging that Smith interfered with plaintiff's employment relationship with Raytheon.

However, the complaint does not allege an agreement between Smith and Raytheon for a fixed term of employment, and in the absence of such an agreement, employment is terminable at will, provided no improper methods were used. The amended complaint fails to state a claim for interference with employment relations. Duggin v. Adams, 234 Va. 221, 226-27, 360 S.E.2d 832, 836 (1987); Hechler Chevrolet, Inc. v. General Motors Corp., 230 Va. 396, 402, 337 S.E. 2d 744, 748 (1985).

The defendants' motion to dismiss and for summary judgment should be granted and an appropriate order shall issue.

/s/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 19, 1988

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

ALEXANDRIA DIVISION

LAWRENCE J. KORB,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO.
	)	88-0207-A
JOHN F. LEHMAN, et al.,	)	
	)	
Defendants,	)	

ORDER

In accordance with the accompanying Memorandum Opinion, it is hereby

ORDERED that this case is DISMISSED as to all defendants.

/s/

UNITED STATES DISTRICT JUDGE

Alexandria, Virginia
July 19, 1988

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

LAWRENCE J. KORB, 3256 Niagara Square Pittsburgh, Pennsylvania Plaintiff, v. JOHN F. LEHMAN, JR., 1112 Waverly Way McLean, Virginia 22101; EVERETT PYATT 4560 25th Road North Arlington, Virginia 22207; MELVYN R. PAISLEY, 6516 Ridge Street McLean, Virginia 22101; and CARL M. SMITH 213 So. Lee Street Alexandria, Virginia 22314 Defendants.	)	Civil Action No 88-0207-A

AMENDED COMPLAINT

1. This is a civil action for monetary damages arising under the First Amendment to the Constitution of the United States and the common law.

2. This Court has jurisdiction over this action under 28 U.S.C. § 1331 and the doctrine of pendent jurisdiction. Venue is proper under 28 U.S.C. § 1391(b).

3. Plaintiff Lawrence J. Korb ("Dr. Korb") served as the Assistant Secretary of Defense (Manpower, Installations and Logistics) in the United States Department of Defense from 1981 to 1985. He resigned from this position and was hired in September, 1985, by Raytheon Corporation, a manufacturer of weapons systems and a major defense contractor for the United States Department of Defense. Dr. Korb served as Vice President in charge of Raytheon's

"Washington, D.C." office located in Arlington, Virginia, and was responsible for Congressional relations and liaison with various government departments, including the Department of Defense.

4. Defendant John F. Lehman, Jr., served in 1986 and at all times material hereto as Secretary of the Navy.

5. Defendant Everett Pyatt served in 1986 and at all times material hereto as Assistant Secretary of the Navy (Shipbuilding and Logistics).

6. Defendant Melvyn R. Paisley served in 1986 and at all times material hereto as Assistant Secretary of the Navy (Research, Engineering and Systems).

7. Defendant Carl M. Smith was in 1986 and at all times material hereto a Senate Armed Services Committee staff member whose duties included oversight of the missile budget.

8. In or about December, 1985, Dr. Korb, in his private capacity, but with the permission of Raytheon, joined the Committee for National Security (CNS), a Washington-based nonprofit, bipartisan organization whose members include former Defense Department officials and military officers. The goal of CNS is to encourage informed public debate on national security issues and to expand the constituency for policies and programs designed to advance national security while reducing the risk of nuclear war. For some years, CNS has published an annual alternative defense budget as one of its educational activities.

9. On February 25, 1986, CNS held a press conference to announce the publication of its alternative defense budget. As a member of CNS, Dr. Korb

endorsed the alternative budget and participated with other CNS members in describing it to the press. The following day the CNS press conference was reported in The Washington Post, and Dr. Korb's role as a former Defense official who was now critical of defense spending was prominently featured. The Post article also stated that during the press conference Dr. Korb had urged a scaling back of the planned 600 ship, 15 carrier-group Navy that was supported by defendant Lehman, then Secretary of the Navy.

10. After reading the newspaper account of the CNS press conference, Secretary Lehman met with his staff at the Pentagon and informed them that he strongly objected to the fact that Dr. Korb had criticized the Administration's defense policies. With the approval of

Secretary Lehman, that same day Assistant Secretary Pyatt and Assistant Secretary Paisley, each telephoned high-ranking Raytheon executives, including Senior Vice President and President-elect R.G. Shelley, and Dennis J. Picard, chief of the missile division, in order to express their anger at Dr. Korb's statements at the CNS press conference.

11. Defendants Pyatt and Paisley made these calls from their offices in the Pentagon or in Arlington. They warned that Raytheon's future business dealings with the Pentagon could be harmed by Dr. Korb's presence, and demanded that Raytheon prevent Dr. Korb from criticizing the Administration's proposed defense budget. On information and belief, defendant Pyatt also told Mr. Picard that he would stop assisting Raytheon with certain defense contracts.

12. At about the same time as the Pyatt and Paisley calls, defendant Smith also called senior Raytheon executives to complain about Dr. Korb's public criticism of the proposed Defense budget. On information and belief defendant Smith told them that unless Raytheon silenced or removed Dr. Korb, he would no longer meet with anyone from Raytheon's Washington office.

13. In direct and immediate reaction to the angry complaints and explicit and implicit threats by defendants, Raytheon terminated Dr. Korb from his position. Dr. Korb was told that Raytheon would keep him on the payroll until August 31, 1986, with the title "special advisor" in the Washington office.

14. After defendants Lehman, Pyatt, and Paisley (the "Navy Defendants") learned that Dr. Korb had been fired in

response to their telephone calls, they again contacted Raytheon. They reiterated that they wanted Dr. Korb silenced but suggested that Raytheon do so by means other than by outrightly dismissing him.

15. Specifically, on March 19, 1986, defendant Pyatt wrote to Raytheon Vice President for Corporate Marketing Philip A. Phalon, on official Navy stationery, mailed from the Pentagon, that "[t]he Navy objects strongly to officers of our contractors whose salaries are paid in part by Department of Defense, speaking as company officers, attacking President Reagan's Defense program."

16. In addition, on or about March 25, 1986, defendant Lehman personally telephoned Raytheon president D. Brainerd Holmes from his office in the Pentagon

and advised Raytheon to transfer Dr. Korb to another job, out of town.

17. In defending the aforementioned communications about Dr. Korb to Raytheon, defendant Lehman has publicly stated, "I had every hope Raytheon would tell him to shut up and stop testifying against its principal customer."

18. On or about March 27, 1986, in response to defendant Lehman's suggestion to Raytheon president Holmes, Raytheon offered Dr. Korb, as an alternative to dismissal from the company, the option of being assigned as a commercial marketing consultant to a Raytheon subsidiary in Philadelphia, Pennsylvania. In this capacity Dr. Korb's duties would no longer have included dealing with the Department of Defense.

19. The alternative position which Dr. Korb was offered by Raytheon was not

commensurate with the position for which he had been hired with respect to his responsibilities, status, tenure, salary and benefits. Under the circumstances, such a transfer and demotion would also have been personally humiliating for Dr. Korb and would have effectively prevented him from speaking out on important matters of national public concern. For these reasons, Dr. Korb refused to accept this alternative position, and Raytheon accordingly terminated him.

20. The Office of the Inspector General of the Department of Defense conducted an investigation into the propriety and impact of the actions taken by the Navy Defendants against Dr. Korb. The Report of Investigation, dated October 28, 1986, concluded that these "Navy officials acted improperly in that they complained to Raytheon with the

intention of restricting Dr. Korb from making public statements that were contrary to Department of the Navy and the DoD positions....

The Navy officials demonstrated a lack of sensitivity to the right of persons to speak out on public issues and to the responsibility of Government officials not to abuse their office by impinging on those rights.... The fundamental concept that Defense officials do not impinge on the right of private persons, including executives of Defense contractors, from expressing their opinions on matters of public policy, is ... self-evident...."

21. The Inspector General's Report of Investigation also concluded that the Navy Defendants should have recognized at the outset that Raytheon might take adverse action against Dr. Korb as the "natural consequence" of their complaints

to Raytheon about him. The Report found that these complaints, along with defendant Smith's complaint to Raytheon described in paragraph 12 of this Complaint, substantially influenced Raytheon's decision to remove Dr. Korb.

22. The Report of Investigation recommended, among other things, that the Secretary of Defense "remind" Defense Department officials of the "prohibition" against taking actions to restrict the lawful freedom of speech rights of non-Defense Department personnel. It further recommended that the Secretary of Defense issue disciplinary letters to the defendant Navy officials "concerning the impropriety of their actions and address their continuing belief that contractor executives lose the right to speak out on Defense policy issues if their views differ from those of the Navy."

Count I

(Against All Defendants)

23. Plaintiff incorporates by reference as if fully stated herein all the statements contained in paragraphs 1 through 22 above.

24. By their aforementioned acts, which were committed under color of their authority as Navy officials or as a Senate Armed Services Committee staff member, defendants intended to and did penalize Dr. Korb for exercising the right of free speech guaranteed to him by the First Amendment of the Constitution of the United States, and otherwise intended to and did deprive Dr. Korb of that right. Defendants intended to chill and prevent Dr. Korb from exercising his right of free speech on future occasions and to punish him for having spoken out at the news conference.

25. Defendants knew or should have known that their actions were unlawful under clearly established law.

26. Defendants acted with reckless and callous indifference towards the constitutional rights of Dr. Korb.

27. As a direct and proximate result of the defendants' acts, Dr. Korb has sustained and will continue to sustain substantial monetary losses and has suffered and will continue to suffer mental and emotional pain, anguish and humiliation.

WHEREFORE, plaintiff seeks:

(1) Compensatory damages from all defendants in an amount to be determined, but exceeding $500,000;

(2) Punitive damages from all defendants; and

(3) Such other and further relief as this Court may deem appropriate, including interest, costs and reasonable attorney's fees.

Count II

(Against Defendant Smith)

28. Plaintiff incorporates by reference as if fully stated herein all the statements contained in paragraphs 1 through 26 above.

29. Defendant Smith by his aforementioned acts, did wrongfully and improperly interfere with plaintiff's employment relationship with Raytheon.

30. Defendant Smith acted with willful disregard for the rights of Dr. Korb.

31. As a direct and proximate result of defendant Smith's acts, Dr. Korb has sustained and will continue to sustain substantial monetary losses.

WHEREFORE, plaintiff seeks:

(1) Compensatory damages from defendant Smith in an amount to be determined, but exceeding $500,000; and

(2) Punitive damages from all defendants; and

(3) Such other and further relief as this Court may deem appropriate, including interest, costs and reasonable attorney's fees.

/s/Kate Martin

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DATED: April 29, 1988

Supreme Court, U.S.
FILED
JUN 10 1991
OFFICE OF THE CLERK

No. 90-1598

IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

LAWRENCE J. KORB,
Petitioner,
v.
JOHN F. LEHMAN, JR., MELVYN R. PAISLEY,
EVERETT PYATT,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT JOHN F. LEHMAN, JR.

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QUESTION PRESENTED

Whether, in early 1986, reasonable officials in respondents' positions would have known that it violated petitioner's clearly established First Amendment rights to contact his private employer and comment adversely on petitioner's public statements concerning matters directly related to the officials' duties and the employer's business, when those contacts allegedly resulted in the petitioner's dismissal.

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IN THE

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OCTOBER TERM, 1990

No. 90-1598

LAWRENCE J. KORB,

Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENT JOHN F. LEHMAN, JR.

SUMMARY

Respondent John F. Lehman, Jr. respectfully requests the Court to deny Lawrence J. Korb's Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit. The opinion below involved a straightforward case of qualified immunity, in which the narrow issue presented was whether respondents reasonably could have known that their specific conduct violated any right of the petitioner's that was clearly established in 1986. The Fourth Circuit correctly applied the well-settled law of qualified immunity to the particular facts of this case, and found that there was case law in existence in 1986 from which respondents reasonably could have concluded their conduct was in fact lawful and appropriate. The court did not render a decision in conflict

with any other court, nor did it depart from the rulings of this Court with regard to qualified immunity. Therefore, petitioner's claim does not merit further review.

COUNTERSTATEMENT OF THE CASE

A. Factual Background.[1]

In September 1985, after four years as the Assistant Secretary of Defense (Manpower, Installations, and Logistics), petitioner Lawrence J. Korb went to work for Raytheon Corporation. As vice president in charge of Raytheon's Washington, D.C. area office, Korb was responsible for Raytheon's relations with Congress and the Department of Defense.

On February 25, 1986, Korb participated in a news conference held by an organization called the Committee

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[1] In his Statement of the Case, petitioner asserts that this Court must accept the allegations in petitioner's complaint as true. *See* Petition for Writ of Certiorari 5 n.1 ("Petition"). Respondents have contended throughout this litigation that they are entitled to dismissal even if the petitioner's allegations are taken as true; the courts below, however, clearly were not required to do so, especially when, as will be noted below, the record affirmatively contradicts several key allegations. Respondents filed a Motion to Dismiss, or in the Alternative, for Summary Judgment, supported by declarations and affidavits, and Korb countered with an affidavit of his own. It was therefore appropriate for the courts below to rely on matters outside the pleadings. *See* Fed. R. Civ. P. 12(b)(6), 12(c), and 56(c). This was especially so in light of this Court's guidance that the issue of qualified immunity "should be resolved at the earliest possible stage." *Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987). The district court granted both of respondents' motions in the alternative, Appendix to Petition for Writ of Certiorari 54a ("App."), and the Fourth Circuit implicitly affirmed both the dismissal and the grant of summary judgment on the basis of qualified immunity, as is evidenced by its reliance on matters outside the pleadings and its citation to Fed. R. Civ. P. 56(c). *See* App. 13a. Respondent therefore bases his counterstatement of the facts on the decisions of the courts below, which, viewing the declarations and affidavits in the light most favorable to petitioner, found the undisputed facts stated herein. *See* App. 2a-11a; *id.* at 31a-41a.

for National Security ("CNS") to announce the publication of CNS's "alternative defense budget." An article appeared in the next morning's *Washington Post*, describing CNS as advocating a $200 billion reduction in President Reagan's five-year defense budget and quoting Korb as criticizing the administration's plan to build a 600-ship Navy. The article, headlined "Pentagon Ex-Defender Turns Critic," identified Korb as "a private citizen working for arms maker Raytheon Co.," speaking "as a member of the Committee for National Security."

Upon learning of Korb's remarks from news accounts, and prior to receiving any comments from the Navy or others outside Raytheon, several Raytheon executives became upset. They felt that Korb's statements were not appropriate for a Raytheon executive and that Raytheon inevitably would be associated with Korb's views.

Following the press accounts of the news conference, Korb's statements also were a subject of discussion at a regular morning staff meeting held by Secretary of the Navy John F. Lehman on February 26, 1986. At that meeting, Lehman expressed displeasure that one of the Navy's contractors was advancing programs that Lehman believed seriously would impair national defense. Lehman made no representation that he would seek retribution against Korb or Raytheon. He did not address his comments to anyone in particular, nor did he request or encourage anyone present to call Raytheon.

Later that day, two staff members who attended Secretary Lehman's meeting, Melvyn R. Paisley, Assistant Secretary of the Navy (Research, Engineering, and Systems), and Everett Pyatt, Assistant Secretary of the Navy (Shipbuilding and Logistics), independently and on their own initiative called Raytheon executives to express their displeasure with Korb's statements. Paisley felt that Korb's position was inconsistent with that taken by Raytheon in earlier meetings. As a result, Paisley doubted Raytheon's credibility and felt that he had been

deceived. He called a senior vice president of Raytheon, R. Gene Shelley, with whom Paisley frequently had worked in the past and whom he often called. Paisley told Shelley that the statements attributed to Korb in the *Washington Post* article troubled him, and he expressed his view that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting. Paisley did not ask Shelley to silence or to take any action against Korb. Nor did Shelley view the call as an invitation to take any action against Korb or have the sense that Paisley implicitly expected some action to be taken. Shelley considered the phone call "a minor flap," not relevant to whether Raytheon won or lost defense contracts. App. 35a.

That same day, Pyatt called Dennis Picard, another Raytheon senior vice president. Pyatt told Picard that he disagreed with and was unhappy about the positions attributed to Raytheon's employee Korb—in particular, the claims that $200 billion could be cut from planned defense spending during the next five years and that the Navy's commitment to build and staff 600 ships could be abandoned without adversely affecting the security of the United States. Pyatt also noted that the Navy may not absorb a contractor's lobbying expenses as reimbursable costs (pursuant to 10 U.S.C. § 2324(e)(1)(B) (Supp. 1988)) and that through the payment of general overhead accounts, the Navy was, in effect, contributing a portion of the salary that Raytheon paid Korb. Pyatt did not demand, request, or suggest that Raytheon take any personnel action regarding Korb. Nor did Pyatt attempt to intimidate, coerce, or threaten Picard or Raytheon in any way. Picard did not consider Pyatt's call to be inappropriate in any respect.[2]

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[2] None of the affidavits or declarations submitted by the parties to these calls provides any support for the allegations in Korb's complaint, repeated in his petition, that Paisley or Pyatt threatened Raytheon in any way, made any demands of Raytheon, or

Secretary Lehman did not ask Paisley or Pyatt to make these contacts and did not know these calls were made until after the fact. When he later learned of the telephone calls, Lehman expressed his opinion that Paisley and Pyatt had acted appropriately.[3]

Following Paisley and Pyatt's telephone calls, Raytheon's Picard and Shelley contacted Korb's principal supervisor Philip Phalon to express their own dissatisfaction with Korb's news conference and to report the Navy's reaction to Korb's public statements. They accurately reported the contents of the Navy officials' calls; in particular, they did not tell or imply to Phalon that the Navy had asked Raytheon to silence or terminate Korb, or that the Navy had in any way threatened, coerced, or intimidated Raytheon. Phalon himself did not receive any calls directly from Navy officials immediately following the news coverage of Korb's press conference.

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warned that "Raytheon's future business dealings with the Pentagon could be harmed by Korb's presence." Petition at 7-8; App. 61a. Moreover, Pyatt's affidavit and Picard's declaration establish that there is no support for the allegation in petitioner's complaint, based on "information and belief," that Pyatt told Picard that he would "stop assisting Raytheon with certain defense contracts." Petition at 8; App. 61a. It is significant in this regard that the declarations of all the Raytheon executives involved in this matter were based on and incorporated the transcript of sworn interviews that they had previously given to an independent third party.

[3] Prior to the calls that Pyatt and Paisley made, Lehman did no more than express, at a staff meeting, his personal views on Korb's publicly reported statements. There is no basis in the record for petitioner's allegation, which he repeats here, that Lehman before the fact approved of the telephone calls made by his co-respondents. *See* Petition at 7; App. 59a-60a. As petitioner conceded in pleadings below, Lehman did not express any approval for these telephone contacts before they were made. Lehman personally had no contact with any Raytheon official until after Korb's superiors already had made the decision to remove him from his position.

Phalon was the individual principally responsible for hiring Korb, and during the six months Korb had worked at Raytheon, Phalon and other Raytheon executives had become displeased with Korb's job performance. In fact, Picard had concluded that Korb was not the right person for the job. Phalon was concerned about Korb's regular absences from Raytheon's Washington office due to his extensive speaking schedule, and felt that the frequent press coverage of Korb was inconsistent with Korb's duties at Raytheon. In particular, Phalon was angered when Korb, prior to the February 26 news conference, had permitted a television network news interview, in which he was critical of the yet-to-be announced defense budget, to be taped in Raytheon's offices.

Sometime between February 26 and mid-March 1986, Phalon, after consulting with others at Raytheon, made an initial decision to terminate Korb. While Phalon took into consideration the Navy's calls to Raytheon complaining of Korb's press statements, the calls did not trigger his decision to remove Korb as head of the company's Washington office. Rather, "Korb's departure from [Raytheon] was part of a continuum," according to Phalon, and the calls from the Navy were not "a decisive moment in time" for Korb's relationship with Raytheon. App. 9a.

In mid-March, after Raytheon's initial decision had been made, Secretary Lehman called D. Brainerd Holmes, then president of Raytheon. Lehman had heard reports that Korb was going to be terminated and called to urge Raytheon to reconsider this decision. This was Lehman's first contact with anyone at Raytheon concerning Korb. He assured Holmes that the Navy could work with Korb. Lehman did not suggest or ask that Raytheon take any action against Korb, nor did he make any express or implied threats or statements that could be considered intimidating or coercive. Holmes said the company would take Lehman's views into consideration, but would make

a decision about Korb independent of his relations with the Navy.

On March 7, Assistant Secretary Pyatt met with Phalon. Phalon was assessing whether Raytheon should remove Korb from his position as Washington vice president and sought Pyatt's views. Pyatt responded that the matter was solely for Raytheon to decide, but he stressed that the Navy was fully prepared to work with Korb in the future, if Raytheon should decide against making a change. Pyatt reiterated these views in a letter to Phalon dated March 19, 1986. Assistant Secretary Paisley also wrote a letter at this time to his contact at Raytheon, urging that Korb be retained in some capacity by the company.

Eventually, in an exercise of independent judgment, the responsible officials at Raytheon offered Korb another position, which he declined to accept. Shortly thereafter, at the request of Congress, the Department of Defense Inspector General's Office investigated the facts surrounding Korb's leaving Raytheon. At the conclusion of the investigation, it reported that there was no evidence to suggest that Navy officials either requested or intended that Korb be fired. Further, according to the report, Korb's departure from Raytheon was not solely attributable to the complaints by Paisley and Pyatt, but rather to a combination of factors. The report also concluded that none of the Navy officials violated any existing statute or regulation.

B. Procedural History.

On February 25, 1988, petitioner Korb filed a complaint against respondents Lehman, Pyatt, and Paisley, asserting a *Bivens* claim [4] for violation of Korb's First

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[4] *See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

Amendment rights.[5] The respondents answered the complaint and asserted the affirmative defense of qualified immunity. The United States Magistrate stayed discovery pending respondents' prompt filing of a Joint Motion to Dismiss, or in the Alternative, for Summary Judgment on the grounds of qualified immunity and other issues, in accord with *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("Until this threshold immunity question is resolved, discovery should not be allowed.").

Although discovery had been stayed, the court had before it more than petitioner's complaint. The Department of Defense Inspector General's Office had investigated the facts underlying the complaint and issued a Report of Investigation. Korb relied on this report in filing his complaint.[6] All Raytheon officials directly involved in the underlying facts were interviewed under oath as part of the Inspector General's investigation, and at the request of respondents, they provided declarations incorporating the transcripts of those sworn interrogations. In addition, the three respondents and the petitioner submitted affidavits.[7]

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[5] Shortly thereafter, Korb filed an amended complaint, *see* App. 56a, and all references herein are to the amended complaint.

[6] Respondents reserved the right below to challenge the admissibility of this Report of Investigation if the case proceeded to trial.

[7] Two days before the motion was noticed for a hearing, Korb filed a Motion to Lift Discovery Stay. Korb did not request the court to defer a decision on the summary judgment motion pending further discovery, nor did he file an affidavit stating why such deferral was necessary, as required by Federal Rule of Civil Procedure 56(f). *See, e.g., United States v. $5,644,540.00 in United States Currency*, 799 F.2d 1357, 1363 (9th Cir. 1986). Moreover, in exercising its discretion to dismiss the case without further discovery, the trial court's action was consistent with this Court's opinions in *Harlow*, 457 U.S. at 818, and *Anderson*, 483 U.S. at 646 n.6. Thus, Korb's claim now that the district court improperly denied his discovery is without merit.

The district court heard argument on July 15, 1988 and issued a Memorandum Order and Opinion on July 19, 1988, granting respondents' "motion to dismiss and for summary judgment." App. 54a. "Even taking all of [Korb's] allegations as true," the court found, the complaint failed. First, Korb did not and could not claim that respondents exercised any coercive power over Raytheon's decision to remove him, App. 61a-62a, and absent such a claim, government officials could not be held liable under the First Amendment for the conduct of private parties. App. 42a. Second, the district court found that defendants were entitled to qualified immunity, because the complaint failed to allege actions that violated clearly established law. App. 49a. Citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987), the trial court concluded that "when defendants' alleged conduct is judged 'in light of pre-existing law,' what is 'apparent' is that the conduct was entirely appropriate and lawful." App. 50a. Third, the court found that respondents' conduct was not the proximate cause of Korb's removal, which was the result of an independent decision by Raytheon. App. 51a-52a.

Relying on this Court's decisions in *Harlow*, 457 U.S. 800, and *Anderson*, 483 U.S. 635, the Fourth Circuit affirmed the district court's grant of the motion to dismiss and the motion for summary judgment on the ground that the respondents were protected by qualified immunity. The panel stated that "at the time the conduct alleged in the complaint occurred, there was no law declaring that such conduct might give rise to a constitutional violation. In fact, the contrary was indicated." App. 23a (citing *Donohoe v. Watt*, 546 F. Supp. 753 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983)). Having concluded that respondents were entitled to qualified immunity, the court did not reach any of the other grounds relied upon by the district court to dismiss the complaint.

REASONS WHY THE WRIT SHOULD BE DENIED

This case does not merit review by the Court. The law of qualified immunity is well-settled, and there is no confusion or disagreement among the federal courts as to how the law should be applied. Petitioner's attempt to find uncertainty among the lower courts is therefore unavailing.

Moreover, the issue before the Fourth Circuit was a narrow one, which turned on the facts regarding defendants' conduct and the state of relevant First Amendment law in 1986. Applying the law of qualified immunity to the particular facts of this case, the Fourth Circuit correctly held that respondents violated no clearly established rights when they contacted Raytheon officials about petitioner. Not only was there no clearly established law prohibiting respondents' actions, there was case law holding that conduct remarkably similar to that of the respondents was lawful and appropriate.

Finally, petitioner complains that the Fourth Circuit failed to settle the question of whether private employees may ever assert a First Amendment claim for damages against government officials, and asks this Court to address that issue. The Court should resist petitioner's request for an advisory opinion concerning the general First Amendment rights of private employees. What the law should be on this issue is not determinative of respondents' qualified immunity defense. The only issue here is whether the respondents' particular conduct violated a right that was clearly established in 1986.

A. The Law Of Qualified Immunity Is Well Settled.

This Court defined the qualified immunity defense in 1982: "[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established rights of which a reasonable person would

have known." *Harlow*, 457 U.S. at 818. In *Anderson v. Creighton*, the Court subsequently explained that the right allegedly violated must be articulated with some particularity, and cautioned against broad generalizations of the relevant legal right that effectively would nullify the qualified immunity defense. 483 U.S. at 639. While the *Anderson* Court stated that the precise fact situation at issue need not have been held unlawful for the qualified immunity defense to fail, it did require that the "contours of the right" that the official is alleged to have violated "be sufficiently clear that a reasonable official would understand that *what he is doing* violates that right." *Id.* at 640 (emphasis added).

B. There Is No Dispute Or Confusion About How To Apply These Standards.

Contrary to petitioner's argument, the Courts of Appeals have not been confused by these standards, nor have they misapplied them. In each of the cases petitioner cites, *see* Petition at 26-27 & nn.7-8, the Court of Appeals correctly applied the *Harlow* standard as refined by *Anderson*, with no disagreement or confusion. These courts first articulated the particular right alleged to have been violated, and then looked to see if the right was clearly established.[8] In accord with this Court's teachings, these courts all stressed that neither a prior case with the exact factual situation nor binding precedent is necessary to find that a right was clearly estab-

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[8] *See, e.g., Dube v. State Univ. of New York*, 900 F.2d 587, 597 (2d Cir. 1990) (issue not whether speaking on issues of public importance may furnish the basis for dismissal from public employment, but whether employee's speech in this instance clearly involved matters of public concern), *petition for cert. filed*, 59 U.S.L.W. 3278 (Sept. 27, 1990); *Cleveland-Perdue v. Brutsche*, 881 F.2d 427, 430-31 (7th Cir. 1989) (issue not whether it was clearly established that deliberate indifference to prisoner's medical needs violated Eighth Amendment, but whether it was clearly established that the failure to remedy systemic deficiencies at prison's health care facility did), *cert. denied*, 111 S. Ct. 368 (1990).

lished. They did, however, abide by *Anderson's* requirement that the right at issue not be defined at too general a level.[9]

C. The Fourth Circuit Decision Is Correct.

The Fourth Circuit correctly applied these clear and well-settled standards regarding qualified immunity, and correctly concluded that the respondents reasonably believed that their conduct was lawful.

First, contrary to petitioner's assertion, the Fourth Circuit articulated the right alleged to have been violated here with appropriate particularity, consistent with this Court's direction in *Anderson.* The issue in this case was not, as petitioner would have it, the generalized question of whether a private individual has a right to be free from official retaliation for criticizing the government. Rather, the particularized issue, as properly articulated by the courts below, was whether in early 1986, reasonable officials in the respondents' position would have understood that it was unlawful to contact a private company and comment adversely on the public statements of one of its employees—statements concerning matters directly related to both the officials' duties and the company's business—where such contacts allegedly result in the employee's dismissal. *See* App. 18a. This formulation comports with the Court's admonition in *Anderson* that the right at issue be framed in terms of an "objective (albeit fact-specific) question." *Id.* at 641; *see* App. 21a.[10]

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[9] *E.g., Alexander v. Perrill*, 916 F.2d 1392, 1397 (9th Cir. 1990); *Stewart v. Baldwin County Bd. of Educ.*, 908 F.2d 1499, 1504-06 (11th Cir. 1990); *Thompson v. City of Starkville*, 901 F.2d 456, 469-70 (5th Cir. 1990); *Dube*, 900 F.2d at 597-98; *Cleveland-Perdue*, 881 F.2d at 430-31; *Melton v. City of Oklahoma City*, 879 F.2d 706, 729 n.36 (10th Cir. 1989), *rev'd on reh'g on other grounds*, 928 F.2d 920 (10th Cir. 1991) (en banc); *Robinson v. Bibb*, 840 F.2d 349, 350-51 (6th Cir. 1988).

[10] In arguing that the Fourth Circuit over-particularized the right at issue, petitioner stands *Anderson* on its head. In *Ander-*

Next, the Fourth Circuit correctly concluded that the particular right that allegedly was violated in this case—petitioner's right to speak on matters of direct concern to public officials without those officials commenting adversely to petitioner's private employer—was not clearly established in 1986. Even taking all of petitioner's allegations as true, which neither the Fourth Circuit nor this Court is required to do, *see supra* note 1, the Court of Appeals found that no statutes, no regulations, and no case law then existing prohibited respondents' actions. In fact, in a case with allegations almost identical to those alleged here, one court had stated specifically that Cabinet officers and their subordinates "must be able to communicate freely with enterprises having business with [their] department, including the right to offer adverse commentary upon the integrity, competence, judgment, or discretion of [those enterprises'] representatives. Any inhibition of that communication would disserve both the government and those having business with it." *Donohoe*

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son, the Court reversed because the right articulated by the Court of Appeals in that case was simply too general, and its use would "convert the rule of qualified immunity . . . into a rule of virtually unqualified liability by alleging violation of extremely abstract rights." 483 U.S. at 639.

Moreover, contrary to petitioner's contention, the *Anderson* analysis is fully applicable to alleged violations of the First Amendment, even though *Anderson* involved Fourth Amendment rights that turned on issues of reasonableness. *See* Petition at 28 n.9. Although the First Amendment does not use the word "reasonable," it does not provide an absolute right to speak at all times. This Court held over twenty years ago that a public employee's right to comment upon matters of public concern must be balanced with the interest of the government, as an employer, "in promoting the efficiency of the public services it performs through its employees." *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968). This balancing, like the Fourth Amendment's requirement of reasonableness, makes it less likely that the contours of a particular right will be clearly established. *See Melton*, 879 F.2d at 729; *Benson v. Allphin*, 786 F.2d 268, 276 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986).

v. Watt, 546 F. Supp. 753, 756 (D.D.C. 1982), *aff'd mem.*, 713 F.2d 864 (D.C. Cir. 1983).

Petitioner is wrong when he asserts that *Donohoe* rested solely on privacy grounds. In that case, Donohoe sent a letter to the Secretary of the Interior, criticizing the Secretary's political views. The Secretary's assistant then wrote to Donohoe's employer, a company with a number of oil and gas leases pending before the Interior Department. He enclosed the letter that Donohoe had sent to the Secretary and expressed the Secretary's surprise at receiving it. Donohoe subsequently was dismissed from his job. 546 F. Supp. at 755. Donohoe alleged that the government officials' actions had caused him to be terminated, thereby violating both his First Amendment rights and the Privacy Act, 5 U.S.C. § 522(b). The court first found that communicating freely with Donohoe's employer was essential to the officials' duties. 546 F. Supp. at 756. It then concluded that "no constitutional provision, statute (other than the Privacy Act) or judicial decision" established the rights that Donohoe alleged the officials had violated. *Id.* The court went on to discuss the Privacy Act because it was the "only arguably applicable provision," *id.*, not because it was the only one raised. The court concluded that Donohoe had failed to allege *any* claim from which the government officials would not be immune. *Id.* at 757.

In addition, *Benson v. Allphin*, 786 F.2d 268 (7th Cir.), *cert. denied*, 479 U.S. 848 (1986), and *Reuber v. United States*, 750 F.2d 1039 (D.C. Cir. 1984), on which petitioner chiefly relies, do not establish, clearly or otherwise, that respondents' actions violated petitioner's First Amendment rights. In *Benson*, the court affirmed the defendants' summary judgment motion in part, holding that they were in fact entitled to qualified immunity for discharging Benson when he disclosed information on matters of public concern to the press. 786 F.2d at 278. Moreover, the only claim from which the government offi-

cials were not immune was the claim that they denied Benson a *government benefit* after his discharge and that this denial was premised on Benson's exercise of his First Amendment rights. *Id.* at 279. *Benson* thus does not establish that government officials may not speak to a person's *private* employer, with the result that the private employer discharges that person. Furthermore, the *Benson* case was not decided until after the relevant events in this case occurred. This Court never has required officials to anticipate the extension of legal principles, especially not when the contours of those principles themselves are not clearly established. *See id.* at 275.

Reuber also is inapposite. As a practical matter, it is difficult to say that a case that produces three opinions on the relevant issue clearly establishes anything. *See Reuber*, 750 F.2d at 1053 (opinion of Wald, J.); *id.* at 1063 (Bork, J., concurring in part); *id.* at 1079 (Starr, J., dissenting in part and concurring in part). Furthermore, the issue in *Reuber* was whether *private* employers, acting in concert with federal officials, could be state actors against whom a *Bivens* action could be brought. *See id.* at 1055; *id.* at 1063; *id.* at 1070. The court unanimously dismissed the claims against the *government* defendants on procedural grounds, *id.* at 1052-53, and never reached the merits of the claims against the private employers, *e.g.*, *id.* at 1057 n.25, 1072 n.9.[11] Given the posture of the *Reuber* case and its multiple opinions,

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[11] On remand, *Reuber* was transferred to the U.S. District Court for Maryland, and that court's decision was appealed to the Fourth Circuit, which held that Reuber's First Amendment rights were not violated because he failed to establish that government actors exerted control over his private employer's decision to reprimand him. *Reuber v. Food Chemical News, Inc.*, 899 F.2d 271, 288 (4th Cir. 1990), *vacated on reh'g on other grounds*, 925 F.2d 703 (4th Cir. 1991) (en banc). In the present case, the district court likewise dismissed Korb's claim on the alternative ground that the respondents did not exercise any coercive power over Raytheon's decision to remove Korb. App. 61a-62a.

Reuber cannot have established that expressions of concern by the respondents to Raytheon executives would violate petitioner's rights.[12]

D. The Court Should Resist Petitioner's Inappropriate Request For An Advisory Opinion.

Finally, petitioner asks this Court to grant a writ of certiorari because if it does not, the alleged First Amendment rights of private employees generally never will be clearly established. Petition at 28-30. The question raised by the Fourth Circuit's decision, however, is not what the law should be, but only whether the right that respondents allegedly violated was clearly established in 1986. *See Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

In *Mitchell*, the defendant was deemed to be entitled to qualified immunity even though the Supreme Court, subsequent to the events that were the basis of the lawsuit, had declared conduct like that of the defendant's to be violative of the Fourth Amendment. The defendant public official was found to be immune nonetheless, because he could not reasonably have predicted that his conduct was unlawful at the time it occurred. 472 U.S. at 530. As in *Mitchell*, the recognition of petitioner's alleged right at some time after the events of this case simply has no relevance to the question of respondents' qualified immunity.

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[12] None of the other, far-ranging Supreme Court cases cited by petitioner as clearly establishing his right even involves a *Bivens* claim. *See* Petition at 19. Moreover, the scatter-shot nature of those cases further demonstrates that petitioner has overgeneralized the right at issue. It is worth noting in this regard that this Court has yet to recognize the existence of a *Bivens* claim under the First Amendment, which further undermines petitioner's claim that his rights were clearly established. *See Schweiker v. Chilicky*, 487 U.S. 412, 422-23 (1988); *Bush v. Lucas*, 462 U.S. 367, 372 & n.7 (1983); *Nixon v. Fitzgerald*, 457 U.S. 731, 748 n.27 (1982).

Article III of the United States Constitution limits this Court's jurisdiction to "cases and controversies." No such "case or controversy" exists in this case with regard to petitioner's broad, theoretical question concerning First Amendment rights. This becomes strikingly apparent when one considers that petitioner can claim no injury to himself if the law continues to be unsettled, *see Warth v. Seldin*, 422 U.S. 490, 501 (1975), and a decision favorably settling the law would not redress petitioner's injury in any way. *See Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). Certiorari to decide the issue is therefore inappropriate.[13]

CONCLUSION

The Fourth Circuit correctly applied well-established law to the particular facts of this case. This case raises no important questions, reflects no circuit conflicts, and does not depart from decisions of this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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[13] Petitioner's argument that the alleged right never can be clearly established unless the Court decides the issue is without merit. Rights may be adjudicated in actions for declaratory and injunctive relief, even if it is not necessary to reach them in an action for damages. *See Benson*, 786 F.2d at 279 n.26.

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No. 90-1598

In the Supreme Court of the United States

OCTOBER TERM, 1991

LAWRENCE J. KORB, PETITIONER

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT EVERETT PYATT IN OPPOSITION

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QUESTION PRESENTED

Whether the courts below correctly dismissed petitioner's *Bivens* action.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1a-24a, 25a-26a, 27a-28a) is reported at 919 F.2d 243. The opinion of the district court (Pet. App. 29a-54a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 1990. On February 15 and April 15, 1991, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including April 15, 1991. The petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In early 1986, petitioner was a vice president of Raytheon Corporation. Petitioner ran the firm's Washington, D.C., office, and was responsible for corporate relations with, among other entities, Congress and the Department of Defense. Before joining Raytheon, petitioner served four years as the Assistant Secretary of Defense for Manpower, Installations, and Logistics. Pet. App. 2a.

On February 25, 1986, petitioner spoke at a press conference held by the Committee for National Security—"a group of private citizens organized to encourage informed debate about national security issues." Pet. App. 2a. The news conference—reported by *The Washington Post* and local news media—announced the Committee's publication of an "alternative defense budget." *Id.* at 3a. According to published reports, petitioner advocated reducing the President's five-year defense budget by $200 billion and scaling back the planned 600-ship, 15-carrier Navy fleet. *Ibid.* The *Post* article, "entitled 'Pentagon Ex-Defender Turns Critic[,]' identified [petitioner] as 'a private citizen working for arms-maker Raytheon Co.'" *Id.* at 4a (footnote omitted).

Respondent, Secretary of the Navy John F. Lehman, Jr., talked about petitioner's press conference at his regular staff meeting the next morning. Respondents Melvin R. Paisley and Everett Pyatt, Assistant Secretaries of the Navy, attended the meeting. At that meeting, Lehman "expressed his indignation about [petitioner's] remarks and his belief that a company under contract to the Navy might be advancing programs that would seriously impair national defense." Pet. App. 4a. Meanwhile, at Raytheon, "[s]everal executives felt that the statements attributed to [petitioner] were not appropriate for a Raytheon employee and that the company would be inexorably associated with the well-publicized views of [petitioner]." *Id.* at 5a.

After the staff meeting, Paisley and Pyatt – on their own initiatives – telephoned Raytheon senior executives. Paisley called R. Gene Shelley and criticized petitioner, "averring that a Raytheon official ought to be careful about talking in a public forum because of the possibility of inaccurate reporting." Pet. App. 6a. Pyatt telephoned Dennis Picard and objected to petitioner's contention that a 600-ship Navy could be abandoned without affecting the security of the United States.

At no time did Lehman, Paisley, or Pyatt suggest to Raytheon executives that they should take any personnel action against petitioner. Nor did respondents threaten to take any steps against Raytheon. Nonetheless, "[i]n the months preceding [petitioner's] news conference, both [Philip Phalon] and several other high-ranking Raytheon officials had become increasingly dissatisfied with the way in which [petitioner] performed his job." Pet. App. 8a.[1] Phalon was also particularly angered by a network evening news program – taped, as Phalon recognized, in Raytheon's Washington, D.C., office – in which petitioner criticized the yet to be announced defense budget before the news conference of February 25. *Id.* at 8a-9a.

By mid-March 1986, after consulting with other Raytheon executives, Phalon made an initial decision to fire petitioner. According to Phalon, petitioner's "departure from [Raytheon was] part of a continuum. It was not triggered by Navy calls. Nor [were such calls] a decisive moment in time for Dr. [Korb] and his relationship with Raytheon Company." Pet. App. 9a (brackets in original). Upon hearing reports that petitioner might lose his job, Lehman spoke with J. Brainard Holmes, Raytheon's president. Lehman assured Holmes that "the Navy could continue to work with

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[1] Phalon, who was petitioner's principal supervisor, was largely responsible for hiring him. Pet. App. 8a.

[petitioner] and * * * urge[d] Holmes to reconsider the decision to dismiss [petitioner]." *Id.* at 10a. Holmes, who had also been dissatisfied with petitioner's job performance, explained to Lehman that "Raytheon would take the Secretary's views into consideration, but that a decision based upon [petitioner's] entire employment record would be made." *Ibid.* Raytheon ultimately offered petitioner another job in Philadelphia, instead of firing him outright. Petitioner rejected the offer and left the company. *Id.* at 10a-11a.

Meanwhile, the Office of the Inspector General, Department of Defense—at Congress's request—investigated the entire episode. The investigation determined that "there was no evidence to suggest that Navy officials either requested or intended that [petitioner] be fired." Pet. App. 11a. According to the Inspector General's final report, petitioner's

> departure from Raytheon was not solely attributable to the complaints by Paisley and Pyatt, but rather to a combination of factors that included the complaints of the Navy officials, as well as complaints from a staff Member of the Senate Armed Services Committee, Carl M. Smith, and other Raytheon executives.

Ibid.

2. In February 1988, petitioner brought this federal court action against respondents Lehman, Paisley, and Pyatt, claiming that each individual—by his contacts with Raytheon—"intended to * * * penalize [petitioner] for exercising the right of free speech guaranteed to him by the First Amendment [to] the Constitution of the United States, and otherwise intended to * * * deprive [petitioner] of that right." Pet. App. 68a. Petitioner sought compensatory and punitive damages. *Id.* at 69a.

Respondents thereafter filed a motion to dismiss or in the alternative for summary judgment. Respondents con-

tended that petitioner's factual allegations, even if true, did not make out a violation of the First Amendment, because "the essential element of government action is missing from [those] allegations." Resp. Mem. in Support of Mot. to Dis. 14, *Korb* v. *Lehman*, No. 88-0207-A (E.D. Va.) (filed June 17, 1988).[2] Respondents also asserted the defense of qualified immunity, contending that petitioner's allegations did not state a violation of any "clearly established" constitutional right within the meaning of *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). Resp. Mem. in Support of Mot. to Dis. 16-23, *Korb* v. *Lehman*, *supra*.

3. In July 1988, the district court granted respondents' motion and dismissed petitioner's complaint. Pet. App. 29a-54a, 55a. The court first determined that petitioner "does not and cannot allege that [respondents] controlled Raytheon's personnel decisions or compelled [petitioner's] reassignment or termination." *Id.* at 42a. The court therefore concluded that, since "the essential element of government action is missing from [petitioner's] allegations," "there can be no constitutional cause of action for damages upon which relief can be granted." *Id.* at 42a-43a.

The court next considered whether respondents "reasonably could have believed that their alleged conduct was consistent with [petitioner's] first amendment rights." Pet. App. 48a (citing *Anderson* v. *Creighton*, 483 U.S. 635 (1987)). The court pointed out that petitioner

> cites no statute or regulation in effect at the time that made it improper for Secretary Lehman to criticize [petitioner] at a staff meeting, or for the other

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[2] Moreover, respondents argued that even if the complaint were read as alleging a "sufficient nexus between state action and [petitioner's] alleged injury, * * * this is not an appropriate case for recognizing an implied cause of action under the first amendment." Resp. Mem. in Support of Mot. to Dis. 14, *Korb* v. *Lehman*, *supra*.

> [respondents] to express their opinions to a defense contractor about the views or conduct of one of the contractor's employees. Similarly, no policy or other internal directive of the Navy or [Department of Defense] barred or circumscribed [respondents'] discretion in this regard.

Pet. App. 49a-50a. In fact, the court noted, *Donohoe* v. *Watt*, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983), "had held that conduct like that engaged in by [respondents] did not violate clearly established rights." Pet. App. 50a. Accordingly, the court held that petitioner's "allegations fail to state a claim of violation of clearly established law, and [respondents] are * * * protected by qualified immunity." *Id.* at 50a-51a.

Finally, the court concluded that the "record * * * demonstrates that [respondents'] conduct was not the proximate cause of [petitioner's] injury." Pet. App. 51a. In the court's view, "there is no evidence that [respondents] threatened or coerced Raytheon to induce the company to silence or remove [petitioner], and no causal link between [respondents'] conduct and [petitioner's] termination." *Id.* at 53a.

4. The court of appeals affirmed. Pet. App. 1a-24a. As the court recognized,

> [t]he central question in determining the issue of qualified immunity is whether or not the conduct of the government official violated "clearly established law," *i.e.*, the "objective legal reasonableness" of [his] action . . . assessed in light of the legal rules that were "clearly established" at the time it was taken. . . .

Id. at 16a (quoting *Anderson* v. *Creighton*, 483 U.S. 635, 639 (1987)). After reviewing pertinent case law, the court determined "that at the time the conduct alleged in the complaint occurred, there was no law declaring that such con-

duct might give rise to a constitutional violation. In fact, the contrary was indicated." Pet. App. 23a (citing *Donohoe* v. *Watt*, *supra*). The court therefore held respondents "did not violate 'clearly established' law and were thus protected from suit by qualified immunity." *Ibid.*

Judge Sprouse dissented, "feeling that [respondents] are not entitled to qualified immunity under *Harlow* v. *Fitzgerald*, 457 U.S. 800, and *Anderson* v. *Creighton*, 483 U.S. 635." Pet. App. 24a.

ARGUMENT

Petitioner contends (Pet. 18-26) that the courts below erred in dismissing his *Bivens* action on grounds of qualified immunity, because respondents' challenged conduct—as of 1986—plainly infringed his First Amendment rights. In petitioner's view, since "[t]his Court has repeatedly made clear that * * * official retaliation directed at speech on a matter of public concern violates the First Amendment unless there is a compelling governmental justification for such action unrelated to the speech," Pet. 19 (citing cases), "a private individual's First Amendment right to be free of official retaliation for speaking out on matters of public concern * * * is a clearly established right as that term is used in *Harlow* and *Anderson* v. *Creighton*," Pet. 20.

1. At the outset, this case is not an appropriate vehicle for addressing the substantive issue petitioner presents. The district court determined that

> [t]he record * * * demonstrates that [respondents'] conduct was not the proximate cause of [petitioner's] injury. Assistant Secretaries Paisley and Pyatt did not expressly or implicitly ask that [petitioner] be silenced or terminated when they telephoned their contracts [sic] at Raytheon. They did not make statements that were expressly or implicitly threatening, and the Raytheon

> officials did not perceive their calls to be coercive or intimidating. Furthermore, Secretary Lehman neither directed his assistant secretaries to make those calls, nor told them what to say.

Pet. App. 51a; see *id.* at 42a. The court of appeals similarly found that

> [respondent] Pyatt did not demand, request, or suggest that Raytheon take any personnel action regarding [petitioner]. Nor does the record * * * reflect that Pyatt attempted to intimidate, coerce, or threaten Picard or Raytheon in any way.

Id. at 7a; see *id.* at 4a (respondent Lehman's conduct); *id.* at 6a (respondent Paisley's conduct). As the courts below specifically found, the record here does not at all support petitioner's allegation that respondents made any threat of retaliation. Since petitioner has offered no reason for the Court to deviate here from its general practice of declining to review factual findings concurred in by both lower courts, *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 318 n.5 (1985); *United States* v. *Reliable Transfer Co.*, 421 U.S. 397, 401 n.2 (1975); *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635-636 (1967), further review of the substantive issue petitioner presents would be inappropriate.

2. In any event, petitioner's contention rests on a misreading of *Anderson* v. *Creighton*, *supra*. There, this Court stated that—for purposes of the qualified immunity doctrine—"the right the official is alleged to have violated must have been 'clearly established' in a more particularized, and hence more relevant, sense: The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." 483 U.S. at 640. Indeed, in *Anderson*, this Court rejected the sort of generality argument petitioner raises here. In defining the level at which "the test of 'clearly established' [is] to be

applied," *id.* at 639, the Court refused to adopt an analogous standard by which "any action that violates [the Due Process] Clause (no matter how unclear it may be that the particular action is a violation) violates a clearly established right," *ibid.*[3]

Here, as the court of appeals pointed out, the challenged conduct at issue involved respondents'

> contact with officials of [petitioner's] employer in order to express their displeasure with and criticism of [petitioner] for his *public* critical comments regarding the proposed Department of Defense budget and allegedly to cause his employer to fire him for making such comments.

Pet. App. 18a (emphasis in original). In *Donohoe* v. *Watt*, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983), however, the court had determined that "a cabinet officer (and at least his immediate subordinates) must be able to communicate freely with enterprises having business with the department, including the right to offer adverse commentary upon the integrity, competence, judgment, or discretion of their representatives." 546 F. Supp. at 756. The court therefore held that a private sector employee's First Amendment right—to criticize government officials without suffering adverse employment consequences—"is not so clearly established as to overcome the [government official's] defense of immunity." *Ibid.*

In light of *Donohoe*, the courts below correctly held that petitioner's particular *Bivens* action foundered on the governing standard for qualified immunity set forth in

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[3] Petitioner's suggestion (Pet. 23-28) that First Amendment rights demand a special test of specificity may not be squared with *Anderson* v. *Creighton*, 483 U.S. at 639.

Anderson. Accordingly, further review of the issue petitioner purports to present is not warranted.[4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JULY 1991

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[4] Petitioner suggests that the court of appeals held that "a qualified immunity defense is appropriate in constitutional cases unless 'the very action in question has previously been held unlawful.'" Pet. 23 (quoting *Anderson* v. *Creighton*, 483 U.S. at 640). But the court adopted no such holding. See Pet. App. 16a-17a.

Finally, petitioner seeks this Court's review (Pet. 28-30) in order to clarify the scope of the substantive First Amendment issue at stake in this sort of case. As respondent Lehman points out (Br. in Opp. 16-17), petitioner's request for what would amount to an advisory opinion is inappropriate.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

LAWRENCE J. KORB,

Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT

Respondents.

On Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fourth Circuit

BRIEF FOR RESPONDENT PAISLEY IN OPPOSITION

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QUESTION PRESENTED

Whether, in the light of pre-existing law in 1986, it was apparent to respondent federal officials that it would be unlawful for them to comment to petitioner's private employer on matters related to respondents' official duties and directed at petitioner's public statements, allegedly resulting in termination of petitioner's private employment.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

No. 90-1598

LAWRENCE J. KORB,
Petitioner,

v.

JOHN F. LEHMAN, JR., MELVYN R. PAISLEY,
EVERETT PYATT
Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fourth Circuit

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BRIEF FOR RESPONDENT PAISLEY IN OPPOSITION

Respondent Melvyn R. Paisley hereby adopts and incorporates by reference the arguments contained in the Brief for Respondent Pyatt in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in this case. In

addition, Respondent Paisley hereby adopts and incorporates by reference the arguments contained in the Brief for Respondent Lehman in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit filed in this case. For purposes of judicial economy and efficiency, the arguments will not be restated by Respondent Paisley.

For the reasons stated in the briefs which are hereby adopted and incorporated by reference, Respondent Paisley requests that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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(5)

No. 90-1598

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IN THE

Supreme Court of the United States

October Term 1991

LAWRENCE J. KORB,

Petitioner,

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JOHN F. LEHMAN, JR., MELVYN R. PAISLEY, EVERETT PYATT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 90-1598

LAWRENCE J. KORB,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF OF PETITIONER

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1. Respondents contend that the legal issues raised by petitioner are precluded by factual findings of the

lower courts and, accordingly, that this case is not an appropriate vehicle for addressing the substantive question presented by the petition. Pyatt Br. at 7-8. The contention is incorrect. This case comes up on a motion to dismiss in which petitioner's allegations in his amended complaint must be taken as true. Those allegations include that respondents called Raytheon with the intention of silencing further criticism by petitioner of the proposed defense budget and that the respondents' actions caused Raytheon to fire petitioner.

The defendants filed a motion to dismiss or in the alternative for summary judgment arguing that they were entitled to qualified immunity based on plaintiffs' allegations and that their actions did not cause Korb's firing. Based solely on the allegations of the

complaint, the district court held that defendants were entitled to qualified immunity. 12a, 43a, 50a. On the causation issue, however, the district court, without addressing Korb's assertion in opposition to summary judgment that he had been denied all opportunity for discovery and that the material facts were in dispute, granted summary judgment. 51a-53a; see Pyatt Br. at 7-8.

The Court of Appeals did not review this finding on causation, but confined itself to ruling on the qualified

immunity issue. 14a.[1] Thus, only petitioner's allegations, not the lower courts' "findings," are properly before this Court.[2]

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[1] The Court of Appeals' opinion, although not a model of clarity, cannot fairly be read as having "found the undisputed facts." Lehman Br. at 2, n.1. That decision rests solely on the holding that the defendants' alleged conduct did not violate any clearly established right of Korb's. 12a, 18a. The decision never discussed the required findings under Rule 56 to resolve asserted factual disputes. See Pet. at 14 n.3.

[2] Petitioner notes however, that even on the present undeveloped record, the evidence is sufficient to entitle him to a trial of the factual issues. Respondents themselves admit that they called Korb's employer to object to his statements about the proposed budget with the hope that Raytheon would silence him, and that he was then fired. See also Korb v. Raytheon Corp., 410 Mass. 581, 584, 574 N.E.2d 370, 373 (1991) ("Raytheon officials told Korb that he would be terminated from his position . . . because of the Navy, Air Force, and Armed Services Committee objections"). This evidence alone is sufficient to support a jury inference that respondents called Korb's employer with the intent to retaliate against him for his speech and thereby caused him damage. The Inspector (continued...)

2. Respondents' opposition to certiorari also rests on a misstatement of petitioner's legal claim. The issue on which Korb seeks certiorari is whether, in 1986, he had a clearly established right to be free from government induced employment sanctions in retaliation for his speech about the proposed defense budget. Prior to 1986, this Court had repeatedly held that employment sanctions for such protected speech were unconstitutional.[3]

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[2](...continued)
General agreed that the defendants intended improperly to silence Korb, he specifically found that "these Navy officials believe that it is wrong for Defense contractor executives to speak in opposition to a position taken by the DoD" and that they acted on this belief.

[3] Givhan v. Western Line Consol. Sch. Dist., 439 U.S. 410, 414-16 (1979)(dismissal of public school teacher for criticism of school policies as discriminatory violates First Amendment); Mt. Healthy Sch. Dist. Bd. of Ed. v. Doyle, 429 U.S. 274, 283-84

(continued...)

Although, prior to 1986, there was no case holding that government officials may not use employment sanctions against a private employee as punishment for protected speech, there were many such

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[3](...continued)
(1977)(decision not to rehire teacher because of teacher's constitutionally protected speech in publicizing school memorandum violates First Amendment); Perry v. Sindermann, 408 U.S. 593, 598 (1972)("reaffirming" that non-renewal of non-tenured public school teacher's one-year contract may not be predicated on exercise of First Amendment rights); Pickering v. Board of Ed., 391 U.S. 563, 574-75 (1968)(dismissal of teacher for public criticism of school board violates First Amendment); see Benson v. Scott, 734 F.2d 1181, 1185 (7th Cir.) cert. denied, 469 U.S. 1019 (1984)(employees' right to be free from retaliation for exercise of their First Amendment rights has been clear since at least 1968); see also Rankin v. McPherson, 483 U.S. 378, 392 (1987)(discharge of constable's employee for comment about assassination of the President violates First Amendment). This Court has recognized that "[i]t is clearly established that a State may not discharge an employee on a basis that infringes that employee's constitutionally protected interest in freedom of speech." Rankin 483 U.S. at 383.

cases holding that employment sanctions may not be imposed against a public employee. A fortiori, those cases prohibit government use of employment sanctions against private employees for protected speech because the government has no countervailing interest as employer. See Pet. at 25 n.6. This Court should grant certiorari to make clear the important principle that such a fortiori applications of prior decisions constitute clearly established law. Compare the Court of Appeals opinion at 20a-22a.

Thus, contrary to respondents' contention, petitioner does not claim some general right to be free of adverse commentary by government officials on his "integrity, competence, judgment, or discretion." Pyatt Br. at 9. As contemplated by Anderson v. Creighton,

483 U.S. 635 (1987), petitioner has framed his constitutional right in narrow and specific terms -- the right to be free of government action intended to silence or punish his protected speech. Respondents' discussion of the broader category of "adverse commentary" is simply not relevant.

3. For like reason, Donohoe v. Watt, 546 F. Supp. 753 (D.D.C. 1982), aff'd mem., 713 F.2d 864 (D.C. Cir. 1983) is irrelevant. It does not hold that a private sector employee has no clearly established "First Amendment right -- to criticize government officials without suffering adverse employment consequences" through official retaliation.[4] Pyatt Br. at 9. This

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[4] Even if Donohoe had held that private employees had no clearly established right to be free of official retaliation for protected speech through (continued...)

specific First Amendment right was not at issue in Donohoe. That court addressed only the "right to have one's entirely volitional unsolicited personal correspondence to a government official kept secret from anyone including his employer." 546 F. Supp. at 756. In Donohoe government officials transmitted "plaintiff's correspondence to his private employer for informational purposes," which the court characterized as "communicat[ing] freely with enterprises having business with the department, including . . . offer[ing] adverse commentary upon the integrity, competence, judgment, or discretion of their representatives." Id.

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[4](...continued)
employment sanctions, a district court opinion could not make unestablished what prior decisions of this Court had established.

4. Finally, Korb is not seeking an advisory opinion or asking this Court to clearly establish a right for future cases that is not already established. See Lehman Br. at 16-17. To the contrary, this specific right was clearly established before Korb's termination and the Fourth Circuit's decision in this case. That decision, however, clouds the existence of the right and thus undermines its protection for future victims of governmental coercion. Granting the writ will not only remedy Korb's constitutional wrong, it will restore for others this important constitutional protection.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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